# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

## No. 173.

HOME TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

vs.

THE CITY OF LOS ANGELES, A. C. HARPER, MAYOR, AND R. W. BROMGOLD, EDWARD A. CLAMPITT, WALTER J. WREN, NILES PEASE, A. J. WALLACE, HENRY H. YONKIN, HENRY LYON, BERNARD HEALY, AND EVERETT L. BLANCHARD, MEMBERS OF THE COMMON COUNCIL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED SEPTEMBER 3, 1907.

(20,844)

(20,844.)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1907.**

## No. 441.

HOME TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

*vs.*

THE CITY OF LOS ANGELES, A. C. HARPER, MAYOR, AND R. W. DROMGOLD, EDWARD A. CLAMPITT, WALTER J. WREN, NILES PEASE, A. J. WALLACE, HENRY H. YONKIN, HENRY LYON, BERNARD HEALY, AND EVERETT L. BLANCHARD, MEMBERS OF THE COMMON COUNCIL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 7, 1907.

*a* THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to The City of Los Angeles, a municipal corporation; A. C. Harper, as Mayor thereof; and R. W. Dromgold, Edward A. Clampitt, Walter J. Wren, Niles Pease, A. J. Wallace, Henry H. Yonkin, Henry Lyon, Bernard Healy and Everett L. Blanchard, as members of the Common Council thereof, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal duly allowed by the Circuit Court of the United States for the Southern District of California, Southern Division, and filed in the Clerk's office of said Court on the 5th day of August, A. D., 1907, in a case wherein the Home Telephone and Telegraph Company is appellant and you are appellees, to show cause, if any, why the decree rendered against the said appellant as in the appeal mentioned, should not be corrected, and why speedy justice should not be done to the complainant in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this Fifth day of August, A. D., 1907.

OLIN WELLBORN,
*Judge of the Circuit Court of the United States in and for the Southern District of California, Southern Division.*

Service of a copy of the foregoing citation is hereby admitted this Fifth day of August, A. D., 1907.

LESLIE R. HEWITT,
*City Atty.*
JOHN W. SHENK,
*Deputy City Atty.*
*Attorneys for Appellees.*

*b* [Endorsed:] No. —. Dept. —. In the Circuit Court of the United States, Southern District of California, Southern Division. Home Telephone and Telegraph Company, a corporation, complainant, *Plaintiff, vs.* The City of Los Angeles, *et al.*, defendants. Citation. Received copy of within, this —— 190–. —— ——, attorney for —. Filed Aug. 5, 1907 W. M. Van Dyke, clerk, —— ——, deputy. A. B. McCutchen, Oscar A. Trippet, 316 Tajo Building 307 W. 1st St. Los Angeles, Cal., attorney- for complainant.

1 In the Circuit Court of the United States of America, o
Ninth Judicial Circuit, in and for the Southern Di
of California, Southern Division.

No. 1243.

HOME TELEPHONE AND TELEGRAPH COMPANY, a Corporation,
plainant,
*vs.*
THE CITY OF LOS ANGELES, a Municipal Corporation; A. C. HA
as Mayor Thereof; and R. W. DROMGOLD, EDWARD A. CLAM
WALTER J. WREN, NILES PEASE, A. J. WALLACE, HENR
YONKIN, HENRY LYON, BERNARD HEALY and EVERET
BLANCHARD, as Members of the Common Council Thereof
fendants.

2 In the Circuit Court of the United States, Southern Di
of California, Southern Division.

HOME TELEPHONE AND TELEGRAPH COMPANY, a Corporation,
plainant,
*vs.*
THE CITY OF LOS ANGELES, a Municipal Corporation; A. C. HA
as Mayor Thereof; and R. W. DROMGOLD, EDWARD A. CLAM
WALTER J. WREN, NILES PEASE, A. J. WALLACE, HENR
YONKIN, HENRY LYON, BERNARD HEALY and EVERET
BLANCHARD, as Members of the Common Council Thereof
fendants.

*Amended and Supplemental Bill of Complaint.*

To the Honorable Judges of the Circuit Court of the United S
in and for the Southern District of California, Southern
sion:

The Home Telephone and Telegraph Company, a corpora
and a citizen of the State of California, brings this its amende
against the City of Los Angeles and A. C. Harper, as Mayor th
and R. W. Dromgold, Edward A. Clampitt, Walter J. Wren,
Pease, A. J. Wallace, Henry H. Yonkin, Henry Lyon, Be
Healy and Everett L. Blanchard, as the Common Council of
City of Los Angeles, citizens of California, and residents of the
of Los Angeles, and of the Southern District of California.
And thereupon your orator complains and alleges:

I.

That your orator, the Home Telephone and Telegraph Com
a corporation, is now, and ever since the — day of Septe
3 1902, has been a corporation duly organized and exi
under the laws of the State of California, and havin

principal place of business in the said city of Los Angeles, County of Los Angeles, in said State.

II.

That pursuant to and in conformity with the laws of the said State of California, your orator was and is vested with full power and authority to purchase, construct, lease or otherwise acquire, and to hold, operate, maintain, lease, sell or otherwise manage or dispose of all kinds of telegraphic and telephonic rights, patents, licenses, franchises, lines, instruments, submarine and other cables, machinery, wires, poles, materials, apparatus and other property appertaining to the telegraph or telephone business; to deal in all kinds of telephonic, telegraphic and electrical materials and appliances, and to contract for the construction, maintenance and sale of all kinds of telegraphic, telephonic and electrical systems and apparatus; to receive, transmit and deliver telegraphic and telephonic messages for hire, and generally to do and perform all kinds of telegraphic and telephonic business, private and public, and everything pertaining thereto; to do a general district and local telegraph and messenger business in various cities and towns in the State of California and elsewhere; to construct, maintain and operate in cities and towns and elsewhere, telephonic and telegraphic lines connecting the houses and offices of subscribers with its central branch offices, and to connect such houses and offices, towns and other places with such telegraphic and telephonic wires; to acquire, hold and dispose of shares and interests in the capital stock and other property of other corporations, and to acquire and hold real estate for the purpose of its business, with power to sell, lease or otherwise dispose of the same; to purchase, sell, lease and acquire any and all kinds
4 of property pertaining to the business and objects of such corporation, and generally to do and perform all other acts and things which may be deemed necessary or proper to establish and carry on said business in the said State of California, Oregon, Nevada, Washington and Utah, the Territory of Arizona, and elsewhere.

III.

That the defendant, the said City of Los Angeles, is now, and at all the times herein mentioned has been, a municipal corporation organized under and by virtue of the laws of the State of California.

That the defendant A. C. Harper herein is now and has been for some time past, the duly elected and qualified Mayor of said City of Los Angeles, and has been and is now acting as such Mayor.

That the defendants R. W. Dromgold, Edward A. Clampitt, Walter J. Wren, Niles Pease, A. J. Wallace, Henry H. Yonkin, Henry Lyon, Bernard Healy and Everett L. Blanchard are now and have been for some time past, the duly elected and qualified members of the Common Council of said City of Los Angeles, and have been and are now acting as such.

IV.

That the said City of Los Angeles did in the year 1888, by
ceedings then duly had and taken under the provisions of Se
8 of Article XI of the Constitution of the State of California,
vote for, ratify and adopt a charter for said city, which charter
subsequently submitted to the legislature of the State of Califo
and was by the said legislature, by joint resolution of the S
and Assembly of said State, passed and adopted on the 31st da
January, 1889, duly approved as a whole for and as the chart
the said City of Los Angeles, and that the said chart
5 voted for, adopted and approved, with the duly ado
amendments thereto, has from thence hitherto been and
is the charter of the said City of Los Angeles.

V.

And your orator further showeth unto your Honors that the
charter so adopted by the said City of Los Angeles comprises two
three articles, the first of which declares what the corporate po
of said city are; the second article of said charter names the of
of said municipality and designates the duties of their respe
offices; while the third article thereof defines and prescribes
powers and duties of the common council of said city.

And your orator further showeth that Section 2 of said A
I of said charter contains the following provisions concerning
powers of said defendant, the City of Los Angeles, to-wit:

"(12.) To manage, control, sell, lease, or otherwise dispos
any or all the property of the said corporation; and to appropr
the income or proceeds thereof to the use of the said corpora
provided that it shall have no power to mortgage or hypotheca
property for any purpose."

"(17.) To provide and maintain a proper and efficient fir
partment, and make and adopt such measures, rules and regula
for the prevention and extinguishment of fires, and for the pres
tion of property endangered thereby, as may be deemed expedi

"(22.) To make and enforce within its limits such local, p
sanitary and other regulations as are not in conflict with ge
laws and are deemed expedient to maintain the public peace, pr
property, promote the public morals and to preserve the healt
its inhabitants."

"(23.) To exercise all municipal powers necessary to the
plete and efficient management and control of the muni
6 property, and for the efficient administration of the
nicipal government, whether such powers be expressly
merated herein or not, except such powers as are forbidden o
controlled by general law."

"(24.) The powers conferred by this article shall be exercise
ordinance, except as hereinafter provided."

And your orator further showeth that Article III of said ch
contains, among others, the following provisions:

"(SEC. 12.) All legislative power of the city is vested in
Council, subject to the power of veto and approval by the Mayo

hereinafter given, and shall be exercised by ordinance; other action of the Council may be by order upon motion."

"(SEC. 16.) Six members of the Council shall constitute a quorum for the transaction of business, but no ordinance shall be passed or other act done granting a franchise, making any contract, auditing any bill, ordering any work to be done, or supplies to be furnished, disposing of or leasing the city property, ordering any assessment for street improvement, or building sewers, or any other act to be done involving the paying of money, or the incurring of debt by the city, unless two-thirds of the members of the whole Council vote in favor thereof. All other ordinances may be passed by a vote of a majority of the whole Council."

"(SEC. 31.) The Council shall have power, by ordinance, to regulate and provide for lighting of streets, laying down gas pipes and erection of lamp posts, electric towers and other apparatus, and to regulate the sale and use of gas and electric light, and fix and determine the price of gas and electric light, and the rent of gas meters within the city, and regulate the inspection thereof, and to regulate telephone service, and the use of telephones within the city,
7 and to fix and determine the charges for telephones and telephone service, and connections; and to prohibit or regulate the erection of poles for telegraph, telephone or electric wire in the public grounds, streets or alleys, and the placing of wire thereon; and to require the removal from the public grounds, streets or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone or electric wires."

"(SEC. 33.) It shall, by ordinance, provide for maintaining a fire alarm and police telegraph system, and for the cleaning and sprinkling of graded and accepted streets."

And your orator further showeth that the above provisions of said charter are, as it verily believes, the only provisions which are in any wise pertinent to the matters and things in this bill of complaint set forth.

## VI.

And your orator further showeth that some time prior to the 24th day of June, 1901, there was filed with the governing or legislative body of said defendant, the City of Los Angeles, to-wit, with the common council thereof, an application for the franchise hereinafter described and set forth in Exhibit "B"; that said application for said franchise was duly presented to said common council for its consideration, and was by said common council referred to a committee of three of its members, which committee was acting as a Board of Public Works, to investigate the same, and thereupon to report to said council; that thereafter and on the 24th day of June, 1901, the said committee reported back to said council upon said matter, and the record of said Council shows as follows:

"In the matter of the application of M. Adrian King, No. 34, for a franchise for laying and operating a telephone system in the City of Los Angeles, we recommend that the same be granted upon the terms and conditions hereinafter to be adopted, provided, however,

said petitioner shall be allowed to enter only one sid
8 streets in the City, for example: said petitioner sha
enter or occupy the South side of all streets running
and Westerly, and the West side of all streets running Northe
Southerly, deeming it expedient for the City, owing to the
crowded conditions of streets underground, to reserve one sid
streets for such improvements as it may deem wise to make
near future: and provided, further, that said petitioner sh
construct any manhole or conduit within less than 18 inch
any existing water-main or sewer-pipe."

That said report of said committee was thereupon duly ado

And your orator further showeth that subsequently the C
torney of said city was instructed by said common council
pare a draft of notice of sale of said franchise, and thereafter
the 28th day of October, 1901, said draft of said notice of s
presented to said common council, and thereupon the fo
proceedings were had as embodied in the minutes thereof, to

"Draft of Notice of Sale of Telephone franchise was rea
Walker moved that the provisions in said Notice of Sale, t
life of such franchise should be 30 years, be changed so as to
that such time shall be 50 years, which motion was seconded
Pierce, and carried. It was moved by Mr. Bowen, duly s
and carried that said Notice of Sale be referred to the Board
lic Works."

That Messrs. Walker, Pierce and Bowen, mentioned in sai
utes, were at that time the duly elected, qualified and acting
men of said defendant, the said City of Los Angeles.

And your orator further showeth that on the 4th day of Nov
1901, the said city attorney of said defendant, the city of L
geles, made a report to said common council, which amongs
things contained the following concerning said te
9 franchise, as appears from the records of said council:

"I also submit herewith in accordance with your i
tions, Notice of Sale of a telephone franchise for a term of 5
granting the right to construct and maintain and operate c
and wires along and under certain public streets in the City
Angeles, and to erect and maintain poles and wires attached
for the purpose of an electric telephone system."

That said report, with the Notice of Sale, so prepared by sa
Attorney, was referred to a committee of said council known
Board of Public Works, which thereupon made its report
common council, as appears from the records thereof as follo

"We recommend that the application of Mr. M. Adrian K
a franchise for laying and operating a telephone system in t
of Los Angeles, be approved, and that the Notice of Sale
franchise be published in accordance with the drafts submit
the City Attorney, and that the City Clerk be instructed to
said Notice of Sale in the official paper of the City upon the
cant paying the costs for the same." That said report wa
adopted by the Common Council.

## VII.

And your orator further showeth that thereupon said common council in its discretion, advertised the fact of said application, together with a statement that it was proposed to grant the same, in a newspaper published within the corporate limits of said defendant. Said advertisement stated that bids would be received for such franchise, and that it would be awarded to the highest bidder, and the same was published in such newspaper once a day for ten successive days, the said paper being a daily newspaper and the full publication thereof was completed not less than twenty nor more than thirty days before the time fixed for the sale of said franchise, as herein described. That said notice so published was in the words and figures set forth in Exhibit "A" hereto attached and hereof made a part as fully to all intents and purposes as if the same were at this place copied in full, and was dated and published December 9th, 1901.

And your orator further shows that at the time designated in said notice of the sale of said franchises, sealed bids were received therefor, and said bids were raised by responsible persons not less than ten per cent. above the highest sealed bid therefor, and other bids were received, until finally said franchise was struck off and sold and awarded by said governing body to the highest bidder therefor, in gold coin of the United States; that each sealed bid was accompanied by a certified check payable to the treasurer of said municipality for the full amount of said bid, and said successful bidder deposited at least ten per cent. of his bid with the clerk of said municipality before the same was struck off to him; that M. A. King was the successful bidder, and said franchise was sold and struck off to him as aforesaid, and the said M. A. King immediately deposited the said ten per cent. of said bid, and said King bid therefor more than three thousand dollars, and said M. A. King, said successful bidder, deposited with the clerk of said municipality, within twenty-four hours after the acceptance of his bid, the remaining ninety per cent. of the amount thereof.

And your orator further showeth that on the 3rd day of February, 1902, the said City Attorney of said defendant, the City of Los Angeles, duly reported to said council, as appears from the records thereof, as follows:

"In accordance with your instructions, I submit herewith Ordinance granting to M. Adrian King, and his assigns, the right to construct, maintain and operate conduits and wires enclosed therein, and to erect poles, and telephone system in the City of Los Angeles for a period of 50 years; and the grantee has filed the required bond which I have approved as to form."

And your orator further alleges that said M. A. King thereafter filed a bond as required by said governing body and said advertisement, running to the said city, with at least two good and sufficient sureties, to be approved and which was approved by said governing body, in the penal sum prescribed in said advertisement for bids and said governing body, to-wit, in the sum of twenty-five thousand dollars, and conditioned that said bidder would well and truly ob-

serve, fulfil and perform each and every term and condition of sa
franchise, and that in case of any breach of condition of said bon
the whole amount of the penal sum therein named should be take
and deemed to be liquidated damages, and should be recoverab
from the principals and sureties upon said bond. Said bond was
filed with said governing body within five days after said franchi
was awarded, and upon the filing and approval of said bond the sa
franchise was by said governing body or legislative body grante
by ordinance to said M. A. King, to whom the same had been struc
off, sold and awarded as aforesaid.

That the said common council thereupon deferred further actio
until the 5th day of February, 1902, at which time it duly passe
and adopted said ordinance granting said franchise, which said ord
nance was numbered 6959, New Series, and is in the words and figur
set forth in Exhibit "B" hereto attached, and hereof made a pa
as fully, to all intents and purposes, as if the same were at th
place copied in full. That said ordinance number 6959 was du
made and given and passed by the governing body of said city, eve
member voting in favor thereof.

## VIII.

And your orator further showeth that thereafter and on the 24
day of February, 1902, said M. A. King duly assigned sa
12 franchise to one Frank F. Graves, and that thereafter, t
wit, on the — day of September, 1902, the said Frank
Graves duly assigned said franchise to your orator, of which sever
assignments the defendant had due notice as provided in said fra
chise, and consented to the same by ordinance duly passed an
adopted.

And your orator further showeth that it is now the owner
said franchise and of all the telephone system, property and equi
ment constructed and operated thereunder.

## IX.

Your orator further showeth unto your Honors that all the ste
and proceedings had and taken as aforesaid by the defendant, t
said city of Los Angeles, and the predecessors in interest of yo
orator were so had and taken, in pursuance of an act of the legis
ture of the State of California approved March 11th, 1901, entitl
"An Act Providing for the Sale of Street Railroad and Other Fra
chises in Municipalities and Providing Conditions for the Granti
of Such Franchises by Legislative or other Governing Bodies an
Repealing Conflicting Acts," and that all of the steps required to
taken in pursuance of said act of the legislature and the charter
said city, and all other matters connected therewith were duly h
and taken, and that said ordinance No. 6959 was passed and a
proved by said Council as the legislative branch of said defenda
the City of Los Angeles, in accordance with the terms and cond
tions of said — of the legislature and of said charter of said city, a

became effective on the 6th day of February, 1902, and ever since said date has been, and now is, in full force and effect.

That said act of the legislature approved March 11, 1901, was enacted in substitution of a similar act of said legislature approved March 23, 1893, entitled "An Act Providing for the Sale of Railroad and other Franchises in Municipalities and Relative
13 to Granting of Franchises" and an amendment thereof approved March 19th, 1897, entitled "An Act to Amend said Act Approved March 23, 1893 &c." That there have been issued, since March 11th, 1901, in California, a great many franchises for telephone plants; that each and every franchise so granted by such municipalities specifies the maximum rate as in Exhibit "B" to be charged by such company for services rendered in pursuance of the grant of said franchise. And your orator shows that many of said telephone systems within said municipalities are connected with the system of this complainant within the city of Los Angeles.

Your orator further showeth that it is informed and believes, and on such information and belief alleges, that ever since the taking effect of said act of March 23, 1893, and of the various amendments thereto and substitutes thereof, the same have been uniformly observed and complied with by the municipalities and counties of the State of California, and no privilege or franchise for any of the purposes mentioned in said acts has been granted or disposed of by any county, city and county, or city or town, except in pursuance thereof.

And your orator further showeth that the defendant, the City of Los Angeles, has, within the thirteen years last past, sold and granted a large number, to-wit, more than one hundred, of franchises and privileges in pursuance of the said acts of the legislature.

And your orator further shows that it is informed and believes and on such information and belief says that since the passage of said acts of the legislature hundreds of franchises have been sold and granted in pursuance thereof, and that nearly all of said franchises have contained provisions respecting the rate of compensation or charge to be made or received by grantee thereof; and
14 your orator further alleges that various questions concerning the construction and validity of such franchises have come before the Supreme Court of the State of California, and before the federal courts, and that until the defendant, the City of Los Angeles, attempted to fix the rates of your orator as hereinafter shown, there was never any contention but that the rates as fixed in such franchises were not contractual, or that the same were subject to change, alteration or reduction in any manner whatsoever during the period fixed by such franchises; and that the action of the said defendant the City of Los Angeles, in reducing rates below the rates fixed in complainant's franchise, is the first assertion by any municipality or county of any such power, notwithstanding that many cities of California have been, and now are, organized and existing, and for many years last past have been, under the laws of the State of California,

and with charters containing substantially similar provisions to th
of the said defendant the City of Los Angeles hereinbefore quot

And your orator further showeth that it and its predecessor
interest of said franchise, at all times were advised and verily
lieved that pursuant to the act of March 23, 1893, and the s
amendments thereof, and the act of 1901, the City of Los Ang
and other cities of the State of California had the power to gr
franchises and therein fix rates, for such term as the legislat
bodies thereof might, under all the circumstances, deem reasona
in each instance; and had no power to alter or reduce such ra
during said term.

X.

That immediately upon the taking effect of said ordinance
aforesaid, the assignors of your orator, pursuant to the terms there
commenced the work of constructing and laying down the cond
required by said ordinance in the district therein descril
15 and continuously prosecuted said work in good faith a
completed the same in full compliance with the conditions
said ordinance relating thereto, and within the period therein p
scribed, so that within said period a complete conduit system
established of sufficient capacity and extent to accommodate at le
10,000 subscribers and to provide a general telephone service in
parts of said telephone conduit district, and that likewise the s
assignors of this plaintiff did, pursuant to the terms and conditi
of said ordinance and in good faith expend for material and la
used and performed in the construction of said conduit, the erect
of poles and the construction and installation in connection th
with of wires, switchboards and telephonic apparatus and appliam
and within the times specified in said ordinance sums greatly
excess of the sums therein specified to be so expended, and did
expend more than the sum of $200,000 within thirty-six mon
after the grant of said franchise.

And that the assignors of your orator did also, within the peri
of said ordinance provided, after the grant of said franchise,
a statement, verified as therein provided, showing in detail the su
expended as required by and in compliance therewith, and did a
cause to be erected and maintained poles of a size and charac
satisfactory to the street superintendent of said City of Los Ange
and that the assignors of your orator and your orator have execu
and complied with and observed each and all of the terms, p
visions and covenants of the said franchise by it to be executed, c
plied with and observed, and that the said defendant, the City
Los Angeles has never at any time claimed or pretended that y
orator's assignors and your orator had not executed, complied w
and observed the terms, covenants and provisions of said ordina
as aforesaid.

16 XI.

That all of the work done and performed by your orator's
signors and by your orator as aforesaid, and the expenditures m

by them for any and all equipment and appliances as aforesaid, were made, done and performed pursuant to and in reliance upon the terms, covenants and provisions of said ordinance No. 6959 of said city of Los Angeles, and not otherwise; and that the system of your orator in said City of Los Angeles is now and at all times has been maintained and operated pursuant to and in reliance upon the terms, conditions and covenants of said ordinance and not otherwise, and that your orator has no rights of property in the said City of Los Angeles except such as were acquired under the said ordinance No. 6959.

XII.

That pursuant to the powers vested in it by law and the provisions of said charter, and in order to provide for maintaining a fire system and police telegraph system, the said defendant the City of Los Angeles, required in and by Section 8 of the said ordinance that the grantee of said franchise and assigns should furnish to the said City of Los Angeles, if required by it free of any charge at all during the life of the said franchise granted by said ordinance, the use of all necessary conductors, not exceeding 150 pairs in said conduit, for the uninterrupted use of a fire system and police system of said city, and for like purpose the free use of the top cross arm on each of the poles erected or maintained under said franchise during the whole term thereof; that your orator in constructing and laying said conduits and in constructing and erecting its pole lines and in providing its equipment, made provision for said 150 pairs of lines in said conduits and for the maintenance and operation thereof, and provided that said top cross-arms on each of said poles, and in all re-
17 spects and at additional cost and expense it arranged to comply with such provisions of said ordinance, and is now, and at all times has been, able and willing to furnish said conductors, and has as aforesaid reserved the top cross-arm on each of said poles for the use of said city.

XIII.

That it is also provided in and by Section 8 of said ordinance that there shall be furnished to the said City of Los Angeles, free of any charge, 30 telephones which shall be connected with the telephone system of your orator, and that your orator, did, within the time provided and specified in said franchise, so furnish to the defendant said 30 telephones, and did connect the same with the telephone system of your orator, all at its own cost and expense, and without charge to the said City of Los Angeles, and that the said City of Los Angeles is now, and ever since has been, using free of charge as aforesaid, the said 30 telephones.

That Section 1 of said ordinance provides:

"That said conduit, said poles, and the wires enclosed therein or attached thereto, shall be constructed, erected and installed, and at all times maintained, and said right, privilege and franchise is hereby granted, and shall at all times be exercised and enjoyed, in accordance with and subject to each and every of the terms and conditions of this ordinance and not otherwise."

That Section 9 of said ordinance provides:

"That all telephone lines constructed or operated under said fr
chise shall have complete copper metallic circuits, and that the c
duit system constructed and laid down under said franchise shall
of such size and capacity as to accommodate wires, cables and c
ductors, sufficient to provide for ten thousand telephones.

"That the rent or charge for unlimited, independent, meta
circuit, telephone service, in the system established or maintai
under said franchise so long as said system does not connect
exchange with more than 10,000 telephones, shall not exceed
per annum for a telephone installed in any business office or pr
ises, or $30 per annum for a telephone installed in a private r
dence, and that when said system shall comprise more than 10,
telephones, the annual rental or charge for the telephone service sh
not be increased by more than a sum equal to $6.00
18 annum for each one thousand telephones in said city c
nected with said telephone system in excess of 10,000."

That Section 10 of said ordinance provides:

"That except as herein provided, said grantee or his assigns, sh
not, without the consent of the city evidenced by ordinance,
or transfer the conduits, poles, wires, or appliances of any kind or
scription, or sell, lease, transfer or assign any of the rights, or pr
leges herein authorized or granted to any person, company, trust
corporation now, or hereafter, engaged in the telephone, telegra
or conduit business, or to any person for any purpose, and sh
not at any time enter into any combination, directly, or indirec
with any person or persons or any corporation, concerning the
to be charged for telephone or telegraph services and no officers,
ployees, or managers of the conduit or telephone system, author
under this franchise, shall at the same time be in charge of or
officers, employees, or managers of any other conduit or teleph
system constructed or being operated in said city."

Your orator further showeth unto your Honors that the
of installation, maintenance and operation per telephone is v
much greater proportionately as the number of telephones increa
That is to say, after a unit of 10,000 telephones has been insta
and is being operated, the cost thereafter is proportionately m
larger for each added telephone, and that for this reason the
fendant, the City of Los Angeles, fixed said increasing rate as sp
fied in said franchise.

That the rate established by said franchise was at said t
lower than any which had ever been charged for telephones
said city, and lower than any other company than your orator
charges for telephone service in said city, and that there was
at any of the times herein mentioned, any system of teleph
lines with complete copper metallic circuits, other than the sys
of your orator. (That at the time of the advertising and sal
said franchise, there was in operation in said City of Los Ange
one system of telephonic communication, only, and that the co
ration owning the same continues to do business in said city.)

That for many years prior to the sale of said franchises the
19 telephone service provided for the residents of the City of Los Angeles was in the hands of one corporation, which had a monopoly of such business; that the wires, pole lines, equipment, system and service of said last mentioned corporation were of the most inferior description, and as a consequence the residents of said city were greatly desirous of having a competing system, and particularly such a system as was and is described and provided for by the franchise now owned by your orator. That at the time said franchise was advertised for sale and sold the city required the use of 150 pairs of lines as provided for in said franchise, and the use of the top cross-arm of each pole to be erected under said franchise for the fire alarm and police telegraph system of said city, and said city needed the use of thirty telephones, as provided in said franchise; that all of said telephones have been used by the said city ever since the construction of said plant of your orator, and are now used by the city, and the city is using some of the lines in the conduit of your orator, and the top cross-arm of some of its poles, and the city has need for the things it is using as aforesaid, for public benefit and in the discharge of its functions.

That the reasonable value to the said City of Los Angeles of the use of said 30 telephones provided by said franchise to be furnished free of charge, and the free use of one hundred and fifty pairs of lines for the fire system and police telegraph system of said city, and the free use of the top cross-arm on each of the poles erected and maintained under said franchise, is and will be, during the life of said franchise, of the sum of four hundred and fifty thousand dollars. That two per cent. of the gross annual receipts required by said franchise to be paid to the City of Los Angeles will amount seven
to more than the sum of five hundred thousand dollars.

20 That no other telephone company operating in said city is required to pay to said city any of its receipts, nor to furnish to said city free service of any kind, and your orator further showeth unto your Honors that the greatly increased growth of said City of Los Angeles, both in population and territory, has greatly increased the expense to your orator in furnishing said free telephone service to said City of Los Angeles, and said service for its police and fire departments, and will continue so to increase during the life of said franchise.

That your orator and its assigns, acting under and pursuant to the terms of this franchise and not otherwise and particularly in the belief that the clauses thereof declaring maximum rates, could not be changed nor the rates reduced during the life of said franchise, have constructed more than five miles of underground conduit and constructed more than one hundred miles of pole lines, and have installed more than twenty thousand telephones in said city, and have, in compliance with said franchise, and at great additional expense, constructed and erected and are now operating a system of telephone lines having complete copper metallic circuits.

That in full reliance upon its right to charge the full rates fixed

by said franchise, if it is so desired, and for the purpose of pro
such money as it was necessary that it should have for the co
tion of said telephone system, your orator issued its bonds, a
rowed thereon the money so needed; that your orator has iss
the purpose aforesaid, bonds amounting to two and a half
dollars, payable in gold coin with semi-annual interest at the
tive per cent. per annum, that all of said bonds outstanding
cured by a mortgage or deed of trust, by the terms of which
property rights, privileges and franchises of your orator, includi
franchise or right fixed by said franchise, to charge th
21 of toll therein named, together with all the tolls, issues
ings and profits arising therefrom, have been mortga
trustees therein named, for the use, benefit and security of the
of such bonds, and such bonds have been sold to parties purc
the same in the full faith and belief that your orator had th
to charge the full rates fixed by said franchise, without any
upon the part of said City of Los Angeles, or any board or
thereof to interfere, lessen, reduce or impair the same, an
right to have and receive the rates so fixed being so mortga
a part of the security for the payment of said bonded indebt
the action of said City by the adoption of Section 12 of th
nance hereto attached and marked Exhibit "C" and ord
marked Exhibit "D," is an impairment of the obligation of sa
tract as against the rights of said bondholders under and by
of the security created by said various mortgages and in cont
tion of section 10 of article 1 of the Constitution of the United
as herein more specifically set forth.

Your orator further showeth unto your Honors that it
means of providing moneys for the extension of its system a
constructing additional pole lines and supplying additiona
phones to the inhabitants of said City of Los Angeles, except
sale of its bonds and stock, and that owing to the passage by t
Common Council of said ordinance Exhibits "C" and "D,"
orator is unable to sell said securities except at a great loss to
is unable to secure moneys wherewith to construct pole lines an
ply telephones to meet the demands upon it for telephone serv
the residents of said City of Los Angeles.

Your orator further shows unto the court that it has in us
than twenty thousand telephones in said city; that if ordinan
hibit "D" is left in force, and the enforcement thereof
22 restrained, or the same is not declared void, your ora
lieves and alleges that the many patrons of the telepho
your orator will refuse to pay the rates fixed in said franchis
demand that your orator accept for the use of said telephon
rates of charge specified in said Exhibit "D" hereto attached, a
refuse to pay to your orator, the additional charge to whic
orator is entitled by virtue of said franchise and thereby your
will be put to a great deal of vexatious litigation. If your
undertakes to remove said telephones from the said subscribers'
ings, there will be conflicts, and law suits will grow out
attempt by your orator to remove said telephones by reason

subscribers failing to pay the rates prescribed by said franchise, and as a result your orator will be put to great loss, damage, hindrance and annoyance in the transaction of its business, which it is entitled to carry on without such suits, litigation, actions, annoyances, hindrances, loss and damage.

XIV.

That on the 27th day of March, 1905, the said defendant by its Common Council, passed an ordinance No. 10,836, New Series, which ordinance is hereto attached, marked "Exhibit C," and hereof made a part to all intents and purposes and as fully as if the same were at this place copied in full. That your orator has not complied with Section 12 of said ordinance "Exhibit C," nor any part thereof, and your orator declines to comply therewith for the reason herein set forth.

XV.

That in pursuance of the terms and conditions of said Section 12 of ordinance marked "Exhibit C," the said defendant did, to-wit, on the 7th day of February, 1906, commence a prosecution in the police court of the City of Los Angeles, against J. M. C. Marble, the President, and J. S. Torrance, the Secretary, and W. C. Patterson, A. B. Cass, H. W. Hellman, Thomas W. Phillips and W. S. Bartlett, directors of your orator, and charged said President, Secretary and directors of your orator with having committed a misdemeanor in that they did wilfully and unlawfully refuse to comply with said Section 12 of ordinance "Exhibit C," and thereupon, upon the complaint filed in said police court by the said defendant, the said defendant caused the arrest and detention of the said Marble and Torrance, upon a warrant issued by the said police court of the said City of Los Angeles, for the violation of said Section 12 of city ordinance marked "Exhibit C," and your orator alleges that the defendant, through its officers and agents, threatens to and will, unless restrained by this Honorable Court, continue to arrest and prosecute the said President and Secretary and directors, each and every day that your orator shall refuse to comply with such Section 12 of ordinance marked "Exhibit C," and will with like penal ordinances continue to prosecute the officers of your orator to compel your orator to permit its rates to be changed. That the said Marble and Torrance, President and Secretary of your orator, are now in the custody of an officer of said defendant, or have given their recognizances for their appearance, and to answer said criminal charge made by said City aforesaid, in pursuance of the said Section 12 of ordinance "Exhibit C."

XVI.

Your orator further shows that in violation of your orator's rights, as fixed and determined by said ordinance "Exhibit B," and contrary to the express terms and provisions thereof, the said defendant the City of Los Angeles, by its Common Council, did on the 28th day of February, 1906, pass and adopt a certain ordinance, a copy of which

is hereunto attached, and marked "Exhibit D," and o
24 Amended Bill of Complaint made a part and as fully
intents and purposes as if the same were at this place e
in full.

That the rates prescribed and fixed by said ordinance "Exhib
are different, lower and less remunerative than the rates agreed
in said ordinance "Exhibit B," and if the said rates fixed by
nance "Exhibit D" are enforced against your orator, it will de
your orator of a large amount of money to-wit, more than the su
Twenty-five Thousand Dollars per annum.

That, in and by said ordinance so adopted on the said 28th d
February, 1906, your orator is forbidden under penalty of fin
imprisonment from collecting the rates provided and fixed
agreed on in said ordinance "Exhibit B."

And, on its information and belief, your orator further aver
the said defendant the City of Los Angeles, claims the right, and
unless restrained by this Honorable Court, pass and adopt here
from time to time, other ordinances in violation of the terms
provisions of said ordinance "Exhibit B," and will thereby fix
determine and lower the rates for telephones and telephone s
that are prescribed and agreed upon in said ordinance "Exhibi
and will prevent your orator from charging the rates fixed in
last mentioned ordinance, and will attempt to enforce its ordi
so lowering said rates as against your orator by the arrest an
prisonment of its officers, in case your orator should charge the
so fixed in said ordinance "Exhibit B."

## XVII.

That on the said 28th day of February, 1906, the said defe
the City of Los Angeles did, by its Common Council, pass and
a certain other ordinance whereby it declared that a competi
your orator in the said City of Los Angeles, engaged i
25 business, should be allowed to charge for telephone ser
sums greatly in excess of that which, by said "Exhib
your orator is permitted to charge. A copy of said ordinan
hereunto annexed and marked "Exhibit E" and made a part o
amended bill of complaint to all intents and purposes with like
as if herein set forth at length.

## XVIII.

And your orator further avers that the adoption and enforce
of said ordinances "Exhibits C and D" will, if permitted by
Honorable Court, impair the obligation of said contract "Exhi
and deprive your orator of its property without due process of
and will abridge the privileges and immunities of your orator
deprive it of the equal protection of the law; and that the ado
of said ordinances "Exhibits D and E" fixing the different rates
charged for the same services deprives your orator of the equa
tection of the law and discriminates against your orator in fav
the Sunset Telephone and Telegraph Company, a similar co
tion, all of which is in violation of the Constitution of the U

States of America, and particularly in violation of Article 1, Section 10, Clause 1 of said Constitution of the United States, and the 14th amendment of said Constitution, and also is in violation of the Constitution, of the State of California.

And your orator further avers that said ordinance "Exhibit D" is void and of no effect, for that it is not a general law or rule adopted by said defendant the City of Los Angeles, for the government of all corporations similar in character to your orator, but is directed solely against and applicable only to your orator, and discriminates against your orator, as hereinbefore shown.

And your orator further avers that said ordinances Exhibits "C" and "D" are invalid and of no effect, for that said defendant, the City of Los Angeles, has not, nor has it ever had, under the
26 Constitution and laws of the State of California, any power or authority to regulate or fix rates to be charged by telephone corporations for services rendered by them, except that the said City of Los Angeles had and has the power to contract for rates to be charged, and had and has the right to contract in the manner and form as shown by said ordinance "Exhibit B."

And your orator further avers that if the provisions of the charter of said City of Los Angeles purport to give it the right to fix rates other than by contract as herein alleged, or purport or attempt to give it a continuing power to fix and regulate rates of your orator, such provisions of such charter are void, for that, in and by the Constitution of the State of California, the power to fix such rates, (if such power exists at all), can only be exercised by authority of a general law applicable to all municipalities and affecting all corporations similar to your orator, and that the Legislature of the State of California has no authority by virtue of said Constitution or otherwise to delegate the power of so fixing rates from time to time to any one municipality or other political subdivision of the state, to the exclusion of the others, and has no authority by delegation of its powers to fix the rates to be charged by your orator.

In that behalf your orator further says, that the Legislature of the said State of California has never passed nor adopted, nor is there now or has there ever been in force, any general law or statute authorizing the fixing and regulation of rates as aforesaid, but that such general power has been and is withheld from other cities and municipalities within the State.

That at the time of the adoption of said charter by said City of Los Angeles, in the year 1888, there was and had been a long
27 time prior thereto, and ever since has been, in said city a telephone system having more than ten thousand telephones, operated by a corporation known as the Sunset Telephone Company. That the franchise under which said system was and is operated does not fix or in any way determine, or attempt to determine, the charge to be made for service or the use of telephones or telephone connections. That said City of Los Angeles never took any steps, or passed any ordinance, or any order, concerning the regulation of the rates to be charged for telephone service within the said city, until the adoption of said ordinance Exhibit "C," which ordinance Exhibit

"C" was passed and adopted by said defendant, the City
Angeles, on the 27th day of March, 1905.

XIX.

And your orator further shows, by way of supplement, th
common council of said defendant, the City of Los Angeles,
the 15th day of March, 1907, pass and adopt a certain othe
nance No. 14,345, a copy of which is hereto attached and
"Exhibit F," and made a part hereof, as fully, to all intents a
poses, as if the same were at this place copied in full. That th
prescribed and fixed by said ordinance "Exhibit F" are di
lower and less remunerative than the rates agreed upon in sa
nance "Exhibit B," and if the rates fixed by said ordinance "
F" are enforced against the complainant, it will deprive th
plainant of a large amount of money, to-wit, more than the
Thirty Thousand Dollars ($30,000.) per annum. That in
said ordinance so adopted on said 15th day of March, 1907
orator is forbidden under penalty of fine and imprisonmen
collecting the rates provided and fixed and agreed upon in sa
nance "Exhibit B."

28 XX.

That on the 15th day of March, 1907, the said City of Los
les did by its common council pass and adopt a certain othe
nance No. 14,346, whereby it declared that a competitor
complainant in the said City of Los Angeles, engaged in lik
ness, should be allowed to charge for telephone service sums
in excess of that which by said ordinance "Exhibit F" this co
ant is permitted to charge. A copy of said ordinance No. 14
hereto attached, marked "Exhibit G" and hereof made a p
fully, to all intents and purposes, and with like effect as if
set forth at length.

*XI.*

And your orator further avers that the adoption and enfor
of said ordinance "Exhibit F" will, if permitted by this Ho
Court, impair the obligation of said contract "Exhibit B,
deprive this complainant of its property without due pro
law, and will abridge the privileges and immunities of thi
plainant, and deprive it of the equal protection of the la
that the adoption of said ordinances "F" and "G" fixing di
rates to be charged for the same service, deprives this compl
of the equal protection of the law, discriminating against co
ant in favor of the Sunset Telephone and Telegraph Comp
similar corporation, all of which is in violation of the Const
of the United States of America, and particularly in violat
Article 1, Section 10, Clause 1 of said Constitution of the
States, and the Fourteenth amendment of said Constitutio
also is in violation of the Constitution of the State of Cali

And your orator further avers that said ordinance "Exhi
is void and of no effect, for that it is not a general law, an

adopted by said City of Los Angeles for the government of all corporations or persons similar in character to complainant,
29 but is directed solely against and is applicable only to this complainant, and discriminates against this complainant as hereinbefore shown.

And your orator further avers that said ordinance is invalid and of no effect, for that said defendant, the City of Los Angeles, has not, nor has it ever had, under the Constitution and laws of the State of California, any power or authority to regulate or fix rates to be charged by telephone corporations for services rendered by them, except that the said City of Los Angeles had, and has, the power to contract for rates to be charged, and had and has the right to contract in the manner and form as shown by said "Exhibit B."

## XXII.

That your orator has no plain, speedy or adequate remedy in the ordinary course of law.

In consideration whereof, and inasmuch as your orator can have no adequate relief except in a court of equity, your orator prays that an injunction *pendente lite* be granted, commanding said defendants and each of them, and their agents, servants and employees from enforcing, or in any manner putting into effect said ordinances "Exhibits "C," "D" and "F" against your orator, and enjoining said defendants, and each of them, from fixing or determining charges for telephone and telephone services and connections of your orator in the City of Los Angeles now or hereafter, and from in any manner violating the provisions terms and conditions of said ordinance Exhibit "B" until such time as your Honors shall appoint and direct, and order herein; that upon final hearing a decree be made that said ordinances Exhibits "C," "D" and "F" are void and of no effect, and that the said defendants, and each
30 of them, be perpetually enjoined as aforesaid from in any manner enforcing said ordinances "Exhibits "C," "D" and "F," and for such other relief as the equity of the case may require, and to your Honors may seem meet.

And may it please your Honors to grant unto your orator a writ of subpœna, to be directed to said defendants the City of Los Angeles, a municipal corporation, A. C. Harper, as Mayor thereof; and R. W. Dromgold, Edward A. Clampitt, Walter J. Wren, Niles Pease, A. J. Wallace, Henry H. Yonkin, Henry Lyon, Bernard Healy and Everett L. Blanchard, as members of the Common Council thereof, and to such others as shall in the discretion of your Honors appear necessary to the hearing and determination of this cause, requiring and commanding each of them to appear herein and answer to this amended bill of complaint, but not under oath, the same being expressly waived, and to abide by and perform such order and decree in the premises as to the court may seem proper and agreeable to equity and good conscience.

A. B. McCUTCHEN,
OSCAR A. TRIPPET,
*Solicitors for Complainant.*

31 EXHIBIT "A."

*Notice of Sale of Telephone Franchise.*

OFFICE OF THE CITY CLERK OF THE CITY OF LOS ANGELE
LOS ANGELES, CALIFORNIA, *December 9th,*

To whom it may concern:

Notice is hereby given that an application has been ma
City Council of the City of Los Angeles for a certain
granting the right, for a period of fifty years, to constru
tain and operate conduits and wires enclosed therein a
under certain public streets in said city, hereinafter deseri
to erect and maintain poles, and wires attached thereto u
and along certain public streets in said city, hereinafter
for the purpose of transmitting sound signals, conversa
intelligence by means of electricity and carrying on a gen
phone business, together with certain appurtenant and
rights, hereinafter mentioned.

And that it is proposed by said City Council to offer for
grant to the highest bidder, said franchise on the terms
ditions hereinafter mentioned.

That said franchise is described as follows, to-wit:

(Here is inserted in said notice the terms and condition
franchise as set forth in Exhibit "B" hereto attached, and
hibit "B" is here now referred to and made a part of this e
fully, to all intents and purposes, as if the same were at t
copied in full.)

Notice is also hereby given that sealed bids, in writing, w
ceived for said franchise up to 11 o'clock in the for
32 the twenty-seventh day of January, 1902; that the
ceived will be opened at that time; that all bids mu
the payment of a stated sum in gold coin of the United Sta
that said franchise will be granted to the person, firm or
tion who shall make the highest cash bid therefor; provide
that at the time of opening said bids any responsible firm
poration, present or represented, may bid for said franchis
not less than ten per cent. above the highest sealed bid there
said bid so made may be raised ten per cent. by any respons
der present, and said franchise will finally be struck off, s
granted by said City Council to the highest bidder therefor
coin of the United States, and said successful bidder will be
to deposit with said City Council, or such person as it may
the full amount of his or its bid within twenty-four hours th
and in case he or it shall fail to do so, then the said franch
be granted to the next highest bidder therefor, and that
Counsil reserves the right to reject any or all bids. Provid
no bid whether sealed or otherwise, shall be received or co
unless the same be in writing, and subscribed by a responsi
der, or by his or its duly authorized agent.

C. H. HANCE
*City Clerk of the City of Los An*

33 EXHIBIT B.

*Ordinance No. 6959.*

(New Series.)

An ordinance granting to M. A. King and his assigns the right for a period of fifty years, to construct, maintain and operate conduits and wires enclosed therein along and under certain public streets in the City of Los Angeles, hereinafter described, and to erect and maintain poles and wires attached thereto upon, over and along certain public streets in said city, hereinafter described, for the purpose of transmitting sound, signals, conversation and intelligence by means of electricity and carrying on a general telephone business, together with certain appurtenant and incident rights.

The Mayor and Council of the City of Los Angeles do ordain as follows:

SECTION 1. That the right, privilege and franchise is hereby granted to M. A. King and his assigns, to construct, lay down, maintain and operate, for the period of fifty years an underground conduit and wires enclosed therein along and under the public streets and alleys in that portion of the City of Los Angeles now known as the "Conduit District," and more particularly described as follows, to-wit:

Commencing at the intersection of the easterly line of Los Angeles and the northerly line of Marchessault streets, thence southerly along the easterly line of Los Angeles street to the southerly line of Seventh street; thence westerly along the southerly line of Seventh street to the westerly line of Hill street; thence northerly along the westerly line of Hill street to the northerly line of First street; thence easterly along the northerly line of First street to the westerly line of Broadway; thence northerly along the westerly line of Broadway to the northerly line of Temple street; thence easterly along the northerly line of Temple street to the westerly line of Spring street;
34 thence northerly along the westerly line of Spring street to the westerly line of Main street; thence northerly along the westerly line of Main street to the northerly line of Marchessault street; thence easterly along the northerly line of Marchessault street to the place of beginning.

And to erect, maintain and operate for the period of fifty years, poles and wires attached thereto, upon, over and along the public streets and alleys of the said city, situate and lying without that portion of said city hereinbefore described.

And to transmit sound, signals, conversation and intelligence through and over said wires by means of electricity, together with the right to construct, operate and maintain all necessary feeders, service wires, house connections and such other apparatus and appliances in connection therewith as may be necessary for the purpose of

safely and efficiently operating and maintaining said conduit, p
and wires, and carrying on a general telephone business by me
thereof (provided, however, that said conduit, said poles and
wires enclosed therein or attached thereto, shall be construc
erected and installed and at all times maintained, and said ri
privilege and franchise is hereby granted and shall be at all ti
exercised and enjoyed in accordance with and subject to each
every of the terms and conditions of this ordinance and not ot
wise.)

SECTION 2. That the conduit to be laid, or maintained under
franchise shall not be larger in horizontal diameter than twe
four inches; that said conduit shall be made of vitrified til
cement lined pipe or wood fiber pipe laid in concrete, and s
be thoroughly insulated, and that said conduit shall be laid at
points, not less than two feet below the established grade of
streets under which the said conduit is laid; that said conduit s
be located in conformity with the regulations that the
35 Council may prescribe; that said conduit shall be
structed in a manner satisfactory to the City Enginee
said city; and that all excavations for laying and repairing said
duit shall be done in such manner as not to interfere with the
use of the streets by the public, except such temporary interfer
as may be necessarily incident to the proper prosecution of
work; that all excavations shall be made and refilled in strict
pliance with the ordinances of said city, which may be in fore
the time of the performance of said work. And that the grante
said franchise or his assigns, shall make such deposits of money
the City Treasurer as may be, from time to time, required from
sons making excavations in the streets of the said city, for the
pose of insuring the restoration of all streets to a good and pe
condition along said excavations.

SECTION 3. That traps or manholes may be constructed along
line of said conduit, for the purpose of affording access thereto,
vided that said traps or manholes shall be located and constru
in conformity with the instructions and to the satisfaction of
City Engineer of said city; said traps or manholes to be so ca
and covered as to be flush with the surface of the street and n
interfere in any way with the use of the said street for trave
traffic.

SECTION 4. That in the event that a change of grade, the la
of any sewer, or the making of any other improvements in an
the streets along and under which said conduits may be laid, sha
the opinion of the Street Superintendent of said city, render n
sary any change in the position of said conduit, the grantee of
franchise or his assigns shall shift or move the same at his or t
own cost and expense, in conformity with the instructions and t
satisfaction of the Street Superintendent, and in case the
grantee or his assigns, shall fail to comply with the instructions g
therefor by said official for ten days after service of said instruc
upon the said grantee, or his assigns, or upon the manager or a
in Los Angeles of said grantee or his assigns, he, the said off

may do the work required in said notice to be done, and keep
36 an itemized account of the cost thereof which said grantee and his assigns, by the acceptance of this franchise agrees to pay immediately upon said account being presented to said grantee, or his assigns, or to such manager or agent in Los Angeles.

SECTION 5. That the work of constructing and laying down said conduit in that portion of the said city of Los Angeles, now known as the "Conduit District," and hereinbefore described, shall be commenced in good faith within not more than four months from the date of the granting of this franchise, and shall be continuously prosecuted thereafter in good faith and shall be completed within not more than three years thereafter, so that within that time a complete conduit system shall be constructed and laid down throughout said "Conduit District," of sufficient capacity and extent to accommodate, at least 10,000 subscribers, and to provide a general telephone service in all parts of said "Conduit District," and if said work be not so commenced, prosecuted and completed within the time and in the manner specified, this franchise shall be forfeited.

SECTION 6. That the grantee of this franchise, and his assigns, shall in good faith lay out and expend for material and labor used and performed in the construction of said conduit, the erection of said poles and in the construction and installation, in the connection therewith of wires, switchboards, and telephonic apparatus and appliances the following sums within the periods hereinafter mentioned, respectively:

$25,000 within eight months after the grant of this franchise; $50,000 within twelve months after said grant; $75,000 within eighteen months after said grant, and $150,000 within twenty-four months after said grant, and $200,000 within thirty-six months after said grant.

And it shall be the duty of the grantee of this franchise or his assigns to file with the City Clerk of the City of Los Angeles,
37 within ten days after the expiration of each of said periods of eight, twelve, eighteen, twenty-four and thirty-six months, after the grant of this franchise, a statement, verified by the oath of said grantee, or his assigns or by the oath of the manager, or presiding officer of said assigns, showing in detail the sums expended for said material and labor by said grantee or his assigns during the preceding period of eight, twelve, eighteen, twenty-four, or thirty-six months, as the case may be. And any failure or omission to pay out and expend for said labor and material the full sum hereinbefore required to be expended within either of the respective periods described, or any refusal or omission to file within the times herein prescribed, any of said verified statements, shall *ipso facto* work a forfeiture of this franchise and of all rights thereunder to the City of Los Angeles.

SECTION 7. That the poles to be erected and maintained under this franchise shall be of a size and character satisfactory to the Street Superintendent of the said city of Los Angeles, and shall be erected and located in conformity with the instructions and to the satisfaction of the said Street Superintendent.

SECTION 8. That the grantee of this franchise or his assigns, s
within thirty days from the date of the commencement of
operation of said telephone business, furnish to the City of
Angeles thirty telephones, and connect the same with the telep
system of said grantee or his assigns, and thereafter maintain
keep the same in good repair and working order during the ter
this franchise without expense or charge to the City of Los An
and that said grantee or his assigns, shall, if required by said
furnish and allow to it, during the term of this franchise, the
use of all necessary conductors, not exceeding one hundred and
pairs in said conduits, for the uninterrupted operation of the
alarm and police telegraph system of said city, and the
38 use of the top crossarm on each of the poles erected, or
tained under this franchise during the whole term th
for the purpose of carrying or stringing wires used by said cit
telegraph, telephone or police, or fire alarm purposes; prov
however, that said city shall, in its use and maintenance of its
ductors on such crossarms, comply with the reasonable plans
rules of the said grantee or his assigns, so that there shall be a
mum danger of contact between the said conductors and the
or cables of the said grantee or assigns.

SECTION 9. That all telephone lines constructed and ope
under this franchise shall have complete copper metallic cir
and that the conduit system constructed and laid down unde
franchise shall be of such size and capacity as to accommodate
cables or conductors sufficient to provide for ten thousand telep
That the rent or charge for unlimited, independent, metall
cuit, telephone service in the system established or maint
under said franchise so long as said system does not connect a
change with more than 10,000 telephones, shall not exceed $
per annum for a telephone installed in any business office or
ises, or $30.00 per annum for a telephone installed in a privat
dence, and that when said system shall comprise more than
telephones, the annual rental or charge for the aforesaid s
shall not be increased by more than a sum equal to $6.00 per a
for each one thousand telephones in said city connected wit
telephone system in excess of 10,000.

SECTION 10. That except as herein provided, said grantee
assigns, shall not, without the consent of the city evidenced by
nance, sell or transfer the conduits, poles, wires, or appliances
kind or description, or sell, lease, transfer or assign any of the
or privileges herein authorized or granted to any person, co
trust, or corporation now, or hereafter, engaged in th
39 phone, telegraph, or conduit business, or to any person f
purpose, and shall not at any time enter into any co
tion, directly, or indirectly with any person or persons or any
ration, concerning the rate to be charged for telephone or tel
services and no officers, employees, or managers of the con
telephone system, authorized under this franchise, shall at th
time be in charge of or be officers, employees, or managers
other conduit or telephone system constructed or being oper

said city; provided, however, that said grantee, or his assigns, may assign this franchise to a corporation organized by him or them under the laws of the State of California, or some other State of the United States, for the purpose of carrying on a general telephone business, and of owning, constructing, maintaining, and operating lines, conduits, cables, wires, and other electrical conductors, together with all necessary feeders, service wires, and house connections, to be used for the transmission of sound, signals and intelligence, by means of electricity, in the City of Los Angeles; and provided further, that notice of said assignment shall be filed with the City Clerk of the City of Los Angeles within sixty days after the execution of said assignment.

SECTION 11. That the person to whom this franchise is granted or awarded, or his assigns, shall, during the life of said franchise, pay to the City of Los Angeles in lawful money of the United States, two per cent. of the gross annual receipts of such grantee, and his assigns, arising from the use, operation or possession of said franchise. No percentage shall be paid for the first five years succeeding the date of this franchise, but thereafter such percentage shall be payable annually and this franchise shall be forfeited by failure to make the payments provided for. The amount of the gross annual receipts of the person, to whom this franchise is granted or awarded or of his assigns, arising from its use, operation or possession, shall be deemed and understood to be, and shall be, the total gross earnings collected or received, or in any manner gained or derived by the grantee of said franchise, or his assigns, from telephone or telegraph charges or rentals, and from the leasing or letting of lines, poles or conduits. And it shall be the duty of the grantee of said franchise, or his assigns, to file with the City Clerk of the City of Los Angeles, at the expiration of six years from the date of the granting of this franchise, and at the expiration of each and every year thereafter, a statement, verified by the oath of said grantee, or his assigns, or by the oath of the manager or presiding officer of said assigns, showing the total gross receipts and gross earnings collected or received, or in any manner gained or derived by the said grantee or his assigns, during the preceding twelve months from telephone and telegraph charges and rentals, and from the leasing or letting of lines, poles, or conduits. And within ten days after the time for filing the aforesaid statement, it shall be the duty of said grantee or his assigns, to pay to the City Treasurer of the City of Los Angeles, the aggregate sum of the said percentage upon the amount of the gross annual receipts arising from the use, operation, or possession of this franchise, determined and computed in the manner hereinbefore provided. And any neglect, omission, or refusal by said grantee, or his assigns to file said verified statement, or to pay the said percentage of the said gross annual receipts, at the times or in the manner hereinbefore provided, shall *ipso facto* work a forfeiture of the franchise hereby granted, and of all rights thereunder to the City of Los Angeles.

SECTION 12. That any neglect, failure or refusal to comply with any of the conditions of this franchise, shall thereupon immediately

*ipso facto* effect a forfeiture thereof, and the said city, by its
Council, may thereupon declare this franchise forfeited and
exclude said grantee or his assigns, from further use of the s
of said city under this franchise, and said grantee and his as
shall thereupon and immediately surrender all rights in
41 to the same, and this franchise shall be deemed and
remain null, void and of no effect.

SECTION 13. The City Clerk shall certify to the passage of
Ordinance and shall cause the same to be published once in th
Angeles Daily Journal, and thereupon and thereafter it shall
effect and be in force.

I hereby certify that the foregoing Ordinance was adopted b
Council of the City of Los Angeles at its meeting of February
1902.

C. H. HANCE,
*City Cl*

Approved this 6th day of February, 1902.

M. P. SNYDER, *May*

2:8 it. (19

EXHIBIT C.

*Ordinance No.* 10836.

(New Series.)

An ordinance regulating the sale of gas and electric light an
inspection of gas and electric meters and the charges for telep
and telephone service and connections.

The Mayor and Council of the City of Los Angeles do orda
follows:

SECTION 1. That the rates to be charged and collected by
person, firm, or corporation, for gas, or for electric light o
telephones, telephone service or telephone connections, furnish
the City of Los Angeles or the inhabitants thereof, shall be fix
a regular or special meeting of the City Council held during
month of February of each year, and shall take effect on the
day of July thereafter, and shall continue in full force and
for the term of one year and no longer.

SEC. 2. It is hereby made the duty of every person, firm o
poration supplying gas to the City of Los Angeles, or to it
habitants, to furnish to the City Council in the month of Jan
of each year a statement in writing, verified by the oa
42 such person, or a member of such firm or of the preside
secretary of such corporation, as the case may be, showi
detail the amount received by such person, firm, or corporation,
the sale of gas and the revenue derived by such person, fir
corporation, from all other sources, during the year precedin
date of such statement, and showing in detail all expenditures

by such person, firm or corporation during said time for supplying gas to the City of Los Angeles and its inhabitants, and for the purchase, construction and maintenance, respectively, of the property necessary to the carrying on of such business.

Every such person firm or corporation shall furnish a detailed statement, verified in like manner as the statement hereinbefore in this section mentioned containing an itemized inventory of all of the gas works, lines, plant and property, owned or used by such person, firm or corporation, and necessary or convenient to the carrying on of the business of supplying gas to said city or to the inhabitants thereof, and showing the actual cost and present cash value of each item thereof.

SEC. 3. That the minimum illumina ing and heating power and quality of gas, supplied to the City of Los Angeles or to the inhabitants thereof by any person, firm or corporation engaged in the business of supplying or distributing gas to said city or to its inhabitants, is hereby fixed and established at an illuminating quality of 16 candle-power, with a gross heat value of 550 British Thermal units per cubic foot; that is to say: Of such an illuminating quality that when burned with a self-luminous flame in a burner adapted to the most economical consumption of gas and consuming five cubic feet of such gas per hour it shall give a light equal to that afforded by 16 standard sperm candles, each consuming 120 grains of sperm per hour, and of such heat-producing quality that the combustion of one cubic foot thereof in a calorimeter will raise 550 pounds of water one degree Fahrenheit in temperature when such gas is supplied to said calorimeter under a pressure of 14.7
43 pounds per square inch, and when both gas and water are supplied to said calorimeter at a temperature of 60 degrees Fahrenheit.

SEC. 4. The office of gas and gas meter inspector is hereby created. Said gas and gas meter inspector shall be appointed by the Mayor. Before entering upon the discharge of his duties he shall take the oath of office and give bond in the sum of $1000, with sufficient sureties, to be approved by the City Council, conditioned for the faithful discharge of his duties.

The gas and gas meter inspector shall receive a salary of $125 per month. He shall have a general knowledge of the art of gas-making and of the most approved methods of examining and testing gas meters and the illuminating and heat-giving qualities of gas, and shall be familiar with the appliances generally used for such examination and testing.

It shall be the duty of the gas and gas meter inspector to test and examine once a week, and as much oftener as may be required by resolution of the City Council, the illuminating and heat-giving quality and value of the gas furnished and distributed to the City of Los Angeles, or to the inhabitants thereof, by any person, firm or corporation, and to report in writing to the City Council at its first meeting in each month the result of all such tests and examinations made by him during the preceding month. He shall also keep a record of all such tests and examinations showing in detail the name

of the person, firm or corporation furnishing the gas tested, th
of each test and the candle power and gross heat value of the
shown by such test measured by the standards described in S
3 hereof; and such record, shall, during regular office hours, l
to public inspection.

It shall also be the duty of the gas and gas meter inspector t
an examination and test of the accuracy and condition of a
meter in the City of Los Angeles installed and used
44 purpose of measuring gas furnished to the City
Angeles, or to any person, firm or corporation therein.
examination and test shall be made upon the written request
person, firm or corporation receiving and using gas throug
measured by the meter to be tested. After making such ex
tion and test the inspector shall give a certificate in writing
ing the result thereof, to the person, firm or corporation at
request the examination is made, and shall deliver to the
firm or corporation furnishing the gas measured by said
duplicate of such certificate. Said certificate shall show th
and place of the examination, the number and make of th
examined, and the percentage and character of error, if any
measurement made thereby. And said inspector shall, an
hereby authorized and empowered to charge and collect a
$1.00 for the making of each such examination and test, pa
the time the written request for the making thereof is rece
him, and the said inspector shall pay into the city treasury
city, on every business day, all fees collected by him during
ceding business day for the making of such tests.

SEC. 5. That all money collected and paid to the City T
by the gas and gas meter inspector *inspector* shall be by
Treasurer placed to the credit of a fund to be called the "G
testing fund," which shall be used for the purpose of paying
pense of making such tests, and for the maintenance and
of apparatus therefor.

SEC. 6. It shall be unlawful for any person, firm or cor
supplying or distributing gas to the City of Los Angeles,
inhabitants thereof, to fail or neglect to furnish to the City
of the City of Los Angeles in the month of January of ea
either of the statements prescribed in Section 2 hereof, or
such person, firm or corporation to furnish, distribute or s
the City of Los Angeles, or to any of the inhabitant
45 gas of an inferior quality, that is to say, having a les
nating or heat-producing power or value, than that p
in Section 3 hereof, unless such inferiority of quality of g
not have been prevented by the exercise of ordinary care or
on the part of such person, firm or corporation; or for a
person, firm or corporation, or for any agent of any such per
or corporation, knowingly to charge or collect from any pers
or corporation for a greater quantity of gas than has been
furnished.

SEC. 7. It is hereby made the duty of every person, firm
poration, supplying electric light to the City of Los Ange

inhabitants, to furnish to the City Council in the month of January of each year, a statement in writing verified by the oath of such person, or of a member, of such firm, or of the president or secretary of such corporation, as the case may be, showing in detail the amount received by such person, firm or corporation from the sale of electric light or from the sale of electric power in the City of Los Angeles during the year preceding the date of such statement, and the total revenue derived from all sources, during said period, from the use, operation or possession of the works, lines, plant or property used by such person, firm, or corporation in whole or in part for the purpose of supplying electric light to the City of Los Angeles, or to its inhabitants, and showing in detail all expenditures made by such person, firm or corporation, during said time, for supplying electric light, and for supplying electric power to the City of Los Angeles, or to its inhabitants, and for supplying electric light and for supplying electric power to consumers outside of the City of Los Angeles, and showing the total amount of electricity in kilowatt hours furnished and supplied during said time to the City of Los Angeles and to its inhabitants for electric light and for electric power respectively, and also the total amount of electricity in kilowatt hours furnished and supplied to all other consumers by means of the works,
46 lines, plant or property owned or used by such person, firm or corporation, in whole or in part, for the purpose of supplying electric light to the City of Los Angeles, or to its inhabitants.

Every such person, firm and corporation shall furnish a detailed statement verified in like manner as the statement hereinbefore in this section mentioned, containing an itemized inventory of all of the works, lines, plant and property owned or used by such person, firm or corporation and necessary or convenient to the carrying on of the business of supplying electric light to the City of Los Angeles, or to the inhabitants thereof, and showing the actual cost and present cash value of each item thereof.

SEC. 8. Every electric lamp furnished or supplied to any customer by any person, firm or corporation, engaged in the business of supplying electric light or electric current, for lighting purposes, to the City of Los Angeles, or its inhabitants, for use with the current so supplied, shall be plainly marked with the voltage at which it is intended to be used, and with the candle power of the light given thereby, at said voltage; and the voltage of the electric current supplied by any such person, firm, or corporation, to any customer, for use in the lamp so furnished, shall not be more than three per cent. greater or less than the voltage for which said lamp is marked; and every such person, firm or corporation shall plainly mark the main or conductor through which any electric current furnished by such person, firm or corporation, for lighting purposes is delivered by affixing thereto, at the point where such main or conductor is attached to the premises of the consumer of such current, a tag or label, bearing in plain figures, the voltage at that point of the current supplied by such main or conductor.

SEC. 9. Every meter furnished or installed by any person, firm, or corporation engaged in the business of supplying electric light or

electric current for lighting purposes to the City of Los An
to its inhabitants, shall be plainly marked on the out
47 on the front thereof, with the current capacity of such
in amperes, and shall also be plainly marked with i
constant; that is to say, with the factor by which the reading
meter must be multiplied in order to ascertain the amount o
registered thereby.

SEC. 10. It shall be unlawful for any person, firm or cor
engaged in the business of supplying electric light or elec
rent for lighting purposes to the City of Los Angeles or its
ants, to furnish or supply to any customer, for use in an
furnished or supplied by such person, firm or corporation
with such current, any electric current which is more tha
per cent. greater or less, in voltage, than the voltage marke
such lamp, unless such excess or deficiency of voltage co
have been prevented by the exercise of ordinary care or p
on the part of such person, firm or corporation, or for a
person, firm or corporation to fail or neglect to mark, in th
ner prescribed in Section 8 hereof, any lamp furnished
plied by such person, firm, or corporation, to any customer
with the current supplied by such person, firm, or corpora
to fail or neglect to mark, in the manner prescribed in S
hereof; any meter furnished or installed by such person,
corporation, or to fail or neglect to mark in the manner pr
in section 8 hereof, the main or conduit through which
current is furnished, or for any such person, firm or corp
or for any agent of any such person, firm or corporation, know
charge or collect from any person, firm or corporation for a
quantity of electric current that has been actually furnished

SEC. 11. It shall be the duty of the City Electrician to m
examination and test of the accuracy, capacity and condition
electric meter in the City of Los Angeles, installed and used
purpose of measuring electric current furnished to the City
Angeles, or to any person, firm, association or corp
48 therein, for lighting purposes, by means of wires
conductors, suspended or laid along, across, or in th
of said city; and to test and measure the voltage of any elec
rent so furnished, at the point where the main or conductor
such current is attached to the premises in which said cu
used. Such examination, test and measurement shall be ma
the written request of the person, firm, association or corp
receiving and using for lighting purposes the electric curre
ured through the meter to be tested. After making such e
tion, test and measurement the City Electrician shall give a
cate, in writing, showing the result thereof, to the person, fir
ciation or corporation at whose request the examination,
measurement is made, and shall deliver to the person, firm
poration furnishing the electric current through said ma
measured by said meter, a duplicate of such certificate. Sai
cate shall show the time and place of the examination, the
and make of the meter examined, its capacity in amperes,

centage and character of error, if any, in the measurement made thereby, and the voltage of the electric current supplied through the said main or conductor at the point where the same is attached to the premises of the consumer. And the City Electrician shall, and is hereby authorized and empowered to charge and collect a fee of $1.00 for the making of each such examination, test and measurement, payable at the time the written request for the making thereof is received by him, and the City Electrician shall pay into the City Treasury of said city, on every business day, all fees collected by him during the preceding business day, for the making of such tests. All moneys so collected and paid into the City Treasury by the City Electrician shall be by the City Treasurer placed to the credit of a fund to be called the Electric Meter Testing Fund, which shall be used for the purpose of paying the expense of making the examination, tests and measurements herein provided for, and for the maintenance and purchase of apparatus therefor.

49 SEC. 12. It is hereby made the duty of every person, firm or corporation supplying telephones, telephone service or telephone connections to the City of Los Angeles or its inhabitants, to furnish to the City Council in the month of January of each year, a statement in writing verified by the oath of such person, or of a member of such firm, or of the president or secretary of such corporation, as the case may be, showing in detail, the amount received by such person, firm or corporation from the renting of telephones, the furnishing of telephone service and the making of telephone connections within the City of Los Angeles, and the revenue derived by such person, firm or corporation, or in any manner arising from the use or operation of a telephone system in the City of Los Angeles, in connection with a telephone system outside of the City of Los Angeles, during the year preceding the date of such statement, and showing in detail all expenditures made by such person, firm or corporation, during the same time for supplying telephones, telephone service and telephone connections to the City of Los Angeles and its inhabitants, and for the purchase, construction and maintenance respectively of the property necessary for the carrying on of such business.

Every such person, firm and corporation shall furnish a detailed statement verified in like manner as the statement, hereinbefore in this section mentioned, containing an itemized inventory of all of the works, lines, plant and property owned or used by such person, firm or corporation and necessary or convenient to the carrying on of the business of supplying telephones, telephone service and telephone connections to the City of Los Angeles, or to the inhabitants thereof, and showing the actual cost and present cash value of each item thereof.

SEC. 13. All telephones supplied and furnished by any person, firm or corporation for use in telephoning by the City of Los Angeles or the inhabitants thereof, shall be in such condition and so

50 connected as that they shall transmit and receive words and sentences when spoken by the human voice in ordinary, clear tones, in such a manner as that such words and sentences can be easily heard and distinguished at the receiving telephone.

It shall be the duty of the City Electrician to make an exa
and test of the condition of any telephone in the City of Los
installed and maintained by any person, firm or corporation
in the business of furnishing telephone and telephone servic
examination and test shall be made upon the written reque
person, firm company or corporation for whose use said tele
installed and maintained. After making such examination
the City Electrician shall give to the person, firm or corpo
whose request the examination and test is made, a certificate
ing showing the condition of such telephone, and shall deliv
person, firm or corporation maintaining the same, a duplicat
certificate.

And the City Electrician shall and he is hereby authorized
powered, to charge and collect a fee of one dollar, for the m
such examination and test, payable at the time the written r
received by him, and the City Electrician shall pay into
Treasury of said city, on every business day, all fees collected
during the preceding business day, for the making of such
tion and tests. All moneys so collected and paid into t
Treasury by the City Electrician shall be by the City
urer placed to the credit of a fund to be called the "Telepho
ing Fund," which shall be used for the purpose of paying
pense of making the examination and tests herein provided
for the maintenance and purchase of any necessary apparat
for.

If after any examination and test provided for in this s
shall appear from the certificate of the City Electric
51 any telephone or its connections so examined and test
in the condition required by this section, it shall be
of the person, firm, or corporation maintaining such te
within twenty-four (24) hours of receiving the duplicate c
of the City Electrician provided for in this section, either to
said telephone or its connections in such condition as that
quirements of this section as to condition of telephones and
tions shall be complied with, or shall replace such telephone
nections by another telephone or other connections which do
with the aforesaid requirements.

SEC. 14. It shall be unlawful for any person, firm or cor
supplying telephones, telephone service or telephone connec
the City of Los Angeles or its inhabitants, to fail or neglec
nish to the City Council of the City of Los Angeles in the m
January of any year, either of the statements prescribed in
12 hereof, or for any such person, firm or corporation know
charge or collect from any person, firm or corporation for th
any telephone or telephone connection which does not com
the requirements of Section 13 hereof.

SEC. 15. The provisions of this Ordinance shall apply onl
sons, firms or corporations furnishing gas, or electric light,
phones, telephone service or telephone connections to the Cit
Angeles, or its inhabitants thereof by means of wires, pipes,

or other conductors suspended or laid along, across or in the streets of said city.

SEC. 16. Any person, firm or corporation violating any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars ($500.00), or by imprisonment in the City Jail for a period not exceeding one hundred days or by both such fine and imprisonment.

52 SEC. 17. The City Clerk shall certify to the passage of this Ordinance and shall cause the same to be published once in the Los Angeles Daily Times.

I hereby certify that the foregoing Ordinance was adopted by the Council of the City of Los Angeles at its meeting of March 13, 1905.

H. J. LELANDE,
*City Clerk.*

I hereby certify that the foregoing Ordinance was presented to the Mayor for his approval and signature March 18th, 1905, and was by the Mayor returned to me without his approval with his objections thereto in writing March 27th, 1905, and the same, together with the Mayor's objections thereto, was laid before the Council at its meeting of April 3rd, 1905, and that on the day last mentioned the passage of *said* Ordinance was reconsidered by the Council and the same was passed over the veto of the Mayor by the following vote, to wit:

Ayes—Messrs. Blanchard, Ford, Hammon, Healy, Hiller, Houghton, Smith and Summerland (8).

Noes—None.

H. J. LELANDE,
*City Clerk.*

4-5 It

53 EXHIBIT "D."

*Ordinance No. —*

(New Series.)

An ordinance fixing the rates to be charged and collected by the Home Telephone & Telegraph Company, a corporation, for telephones, telephone service and telephone connections, in the City of Los Angeles, during the year commencing July 1st, 1906, and ending June 30th, 1907.

The Mayor and Council of the City of Los Angeles do ordain as follows:

SECTION 1. That the rates to be charged and collected by the Home Telephone and Telegraph Company, a corporation, for telephones, telephone service and telephone connections in the City of Los Angeles, furnished to the City of Los Angeles, or to the inhabitants thereof, for the year commencing on the 1st day of July, 1906, and ending on the 30th day of June, 1907, are hereby fixed as follows:

(1) For each telephone installed and maintained in any b
office or premises, connected with*b* the central exchange by
dependent or individual circuit, with unlimited service, $5.
month.

(2) For each telephone installed and maintained in any h
place other than a business office or premises, connected wi
central exchange by an independent or individual circuit, wi
limited service, $2.00 per month.

(3) For each extension telephone, $1.00 per month.

(4) For each private telephone exchange connected with t
tral exchange by an independent circuit on one trunk line
per month; and for each additional trunk line, $4.00 per
and for each telephone station in such private exchange, $1
month.

54 SECTION 2. Any person who shall charge, demand,
or receive, either as officer, agent, collector or employe
said Home Telephone and Telegraph Company, any rate
pensation for telephones, telephone service or telephone con
in the City of Los Angeles, furnished by the said Home Tel
and Telegraph Company to the City of Los Angeles or to any
tant thereof, during the year commencing on the 1st day
1906, and ending on the 30th day of June, 1907, in excess
rates fixed by this ordinance, shall be deemed guilty of a
*a*meanor, and upon conviction thereof, shall be punishable b
in a sum not exceeding one hundred dollars, or by imprisonm
the City Jail for a period not exceeding ninety days, or by bo
fine and imprisonment.

55 EXHIBIT "E."

*Ordinance No. —.*

(New Series.)

An ordinance fixing the rates to be charged and collected
Sunset Telephone & Telegraph Company, a corporation,
phones, telephone service, and telephone connections in t
of Los Angeles, during the year commencing July 1st, 19
ending June 30th, 1907.

The Mayor and Council of the City of Los Angeles do or
follows:

SECTION 1. That the rates to be charged and collected
Sunset Telephone & Telegraph Company, a corporation,
phones, telephone service and telephone connections in the
Los Angeles, furnished to the City of Los Angeles, or to the
itants thereof, for the year commencing on the first day
1906, and ending on the 30th day of June, 1907, are here
as follows:

(1) For each telephone installed and maintained in a

ness office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $8.00 per month.

(2) For each telephone installed and maintained in any business office or premises connected with the central exchange by an independent or individual circuit, with service limited to one hundred calls per month, $5.00 per month; and two cents additional for each call in excess of one hundred in any month.

(3) For each telephone installed and maintained in any business office or premises connected with the central exchange by a two-party line circuit, with unlimited service, $4.00 per month.

(4) For each telephone installed and maintained in any
56 business office or premises connected with the central exchange by a four-party line circuit, with unlimited service, $3.00 per month.

(5) For each telephone installed or maintained in any house or place other than a business office or premises connected with the central exchange by an independent or individual circuit, with unlimited service, $3.00 per month.

(6) For each telephone installed and maintained in any house or place other than a business office or premises, connected with the central exchange by a four-party line circuit, with unlimited service, $1.50 per month.

(7) For each extension telephone $1.00 per month.

(8) For each private telephone exchange, connected with the central exchange by an independent circuit on one trunk line, $8.00 per month; for each additional trunk line, $6.00 per month; for each telephone station in such private telephone exchange $1.00 per month.

SECTION 2. Any person who shall charge, demand, collect or receive, either as officer, agent, collector or employee of the said Sunset Telephone & Telegraph Company, any rate or compensation for telephones, telephone service or telephone connections in the City of Los Angeles furnished by the said Sunset Telephone & Telegraph Company to the City of Los Angeles, or to any inhabitant thereof, during the year commencing July 1st, 1906, and ending June 30th, 1907, in excess of the rates fixed by this ordinance, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine in a sum not exceeding one hundred dollars, or by imprisonment in the City Jail for a period not exceeding ninety days, or by both such fine and imprisonment.

57 EXHIBIT "F."

*Ordinance No.* 14,345.

(New Series.)

An ordinance fixing the rates to be charged and collected by the Home Telephone and Telegraph Company, a corporation, for telephones, telephone service, and telephone connections in the City of Los Angeles, during the year commencing July 1st, 1907, and ending June 30th, 1908.

The Mayor and Council of the City of Los Angeles do ordain as follows:

SECTION 1. That the rates to be charged and collected by the Home Telephone and Telegraph Company, a corporation, for telephones, telephone service and telephone connections in the City of Los Angeles, furnished to the City of Los Angeles, or to the inhabitants thereof, for the year commencing on the 1st day of July 1907, and ending on the 30th day of June, 1908, are hereby fixed as follows:

1. For each telephone installed and maintained in any business office or premises connected with the central exchange by an independent or individual circuit, with unlimited service, $5.00 per month.

2. For each telephone installed or maintained in any house or place, other than a business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $2.00 per month.

3. For each extension telephone, $1.00 per month.

4. For each private telephone exchange connected with the central exchange by an independent circuit on one trunk line, $4.00 per month; for each additional trunk line, $1.00 per month; and for each telephone station in such private exchange $1.00 per month.

58 SEC. 2. Any person, who shall charge, demand, collect or receive, either as officer, agent, collector or employé of the said Home Telephone and Telegraph Company, any rate or compensation for telephones, telephone service or telephone connections in the City of Los Angeles furnished by said Home Telephone and Telegraph Company to the City of Los Angeles, or to any inhabitants thereof, during the year commencing July 1st, 1907, and ending June 30th, 1908, in excess of the rates fixed by this Ordinance, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine in a sum not exceeding one hundred dollars, or by imprisonment in the city jail for a period not exceeding ninety days, or by both such fine and imprisonment.

SEC. 3. This Ordinance is urgently required for the immediate preservation of the public peace, health and safety; and the City

rk shall certify to its passage by a two-thirds vote of the Council, l cause it to be published once in The Los Angeles Daily Journal l thereupon and thereafter it shall take effect and be in force.

I hereby certify that the whole number of members of the City ncil of the City of Los Angeles is nine, and that the foregoing dinance was passed by a two-thirds vote of said Council at its eting of March 11, 1907, by the following vote, to-wit:

Ayes, Messrs. Blanchard, Clampitt, Dromgold, Healy, Lyon, Wal-e, Wren, Yonkin and Pres. Pease (9).

H. J. LELANDE,
*City Clerk.*

Approved this 15th day of March 1907.

A. C. HARPER, *Mayor.*

EXHIBIT "G."

*Ordinance No.* 14,346.

(New Series.)

n Ordinance fixing the rates to be charged and collected by the Sunset Telephone and Telegraph Company, a corporation, for telephones, telephone service, and telephone connections in the City of Los Angeles, during the year commencing July 1st, 1907, and ending June 30th, 1908.

The Mayor and Council of the City of Los Angeles do ordain as lows:

SECTION 1. That the rates to be charged and collected by the nset Telephone and Telegraph Company, a corporation, for tele-ones, telephone service and telephone connections in the City of s Angeles, furnished to the City of Los Angeles, or to the inhab-nts thereof, for the year commencing July 1st, 1907, and ending the 30th day of June, 1908, are hereby fixed as follows:

1. For each telephone installed and maintained in any busi-ss office, or premises, connected with the central exchange by an dependent or individual circuit, with unlimited service $5 per nth.

2. For each telephone installed and maintained in any busi-ss office or premises connected with the central exchange by inde-ndent or individual circuit, with services limited to one hundred lls per month, $5 per month; and two cents additional for each ll in excess of one hundred in any month.

3. For each telephone installed and maintained in any busi-ss office or premises connected with the central exchange by a o-party line circuit, with unlimited service, $4 per month.

4. For each telephone installed and maintained in any busi-ness office or premises connected with the central exchange by a four-party line circuit, with unlimited service, $3 per month.

5. For each telephone installed or maintained in any ho
place, other than a business office or premises, connected wi
central exchange by an independent or individual circuit, wi
limited service, $3 per month.

6. For each telephone installed or maintained in any ho
place, other than a business office or premises, connected wi
central exchange by a four-party line circuit, with unlimited s
$1.50 per month.

7. For each extension telephone, $1.00 per month.

8. For each private telephone exchange connected with th
tral exchange by an independent circuit on one trunk line,
month; for each additional trunk line $6 per month; and fo
telephone station in such private exchange $1.00 per month.

SEC. 2. Any person who shall charge, demand, collect or r
either as officer, agent, collector or employé of the said Sunset
phone and Telegraph Company, any rate or compensation fo
phones, telephone service or telephone connections in the C
Los Angeles furnished by said Sunset Telephone and Tele
Company to the City of Los Angeles, or to any inhabitant th
during the year commencing July 1st, 1907, and ending June
1908, in excess of the rates fixed by this Ordinance, shall be d
guilty of a misdemeanor, and upon conviction thereof shall be
ishable by a fine in a sum not exceeding one hundred dollars,
imprisonment in the city jail for a period not exceeding ninety
or by both such fine and imprisonment.

SEC. 3. This Ordinance is urgently required for the imm
preservation of the public peace, health and safety; and the
Clerk shall certify to its passage by a two-thirds vote
61 Council, and cause it to be published once in The Los A
Daily Journal and thereupon and thereafter it shal
effect and be in force.

I hereby certify that the whole number of members of th
Council of the City of Los Angeles is nine, and that the fore
Ordinance was passed by a two-thirds vote of said Council,
meeting of March 11, 1907, by the following vote to-wit:

Ayes: Messrs. Blanchard, Clampitt, Dromgold, Healy, Lyon
lace, Wren, Youkin and Pres. Pease (9).

H. J. LELANDE,
*City Cl*

Approved this 15th day of March 1907.

A. C. HARPER, *Ma*

(Endorsed:) No. 1243. Dep't ——. In the Circuit Court
United States, Southern District of California, Southern Di
Home Telephone and Telegraph Company, a corporation, Pl
*vs.* The City of Los Angeles, *et al.*, Defendants Amended an
plemental Bill of Complaint. Received copy of within, this
27th 1907 Leslie R. Hewitt C-ty Attorney By John W. S
Jr Attorney for defendants Filed Jul- 27 1907 Wm. M
Dyke, Clerk. Chas. N. Williams Deputy A. B. McCutchen, Os
Trippet 316 Tajo Building 307 W. 1st St. Los Angeles, Cal. At
for Complainant.

62 In the Circuit Court of the United States, Southern District of California, Southern Division.

HOME TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Complainant,

*vs.*

THE CITY OF LOS ANGELES, a Municipal Corporation; A. C. HARPER, as Mayor Thereof; and R. W. DROMGOLD, EDWARD A. CLAMPITT, WALTER J. L. WREN, NILES PEASE, A. J. WALLACE, HENRY H. YONKIN, HENRY LYON, BERNARD HEALY and EVERETT L. BLANCHARD, as Members of the Common Council Thereof, Defendants.

*Stipulation.*

It is hereby stipulated by and between the complainant and defendants that the amended and supplemental bill of complaint filed by the complainant may stand as such, notwithstanding only an order of said court was given to amend the bill of complaint, and it is further stipulated that the demurrer heretofore filed herein to the bill of complaint may stand as a demurrer to the amended and supplemental bill of complaint, and said cause be submitted to the court upon said demurrer.

A. B. McCUTCHEN,
OSCAR A. TRIPPET,
*Solicitors for Complainant.*
W. B. MATHEWS,
LESLIE R. HEWITT,
JOHN W. SHENK,
*Solicitors for Defendants.*

63 (Endorsed:) Original No. 1243 Dept. In the Circuit Court of the United States, Southern District of California, Southern Division. Home Telephone and Telegraph Co., Complainant, *vs.* The City of Los Angeles, *et al.*, Defendants Stipulation. Filed Aug. 5 1907 Wm. M. Van Dyke Clerk A. B. McCutchen, Oscar A. Trippet 315 Coulter Bld'g Los Angeles, Cal. Attorneys for Complainant.

64 In the Circuit Court of the United States in and for the Southern District of California, Southern Division.

HOME TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Complainant,

*vs.*

THE CITY OF LOS ANGELES ET AL., Defendants.

*Demurrer to Bill of Complaint.*

The defendants herein, not confessing all or any of the matters in the bill of complaint contained to be true, as herein set forth, do demur to said bill on the following grounds:

1. For that the same does not state such a case, nor contain any matter of equity, entitling the complainant to any relief against the defendants or any of them.

2. For that the subject of this suit is not within the jurisdiction of this court, sitting as a court of equity, nor has this court, sitting as a court of equity, jurisdiction of the subject matter of said bill or of any of the parties thereto; nor has this court jurisdiction of the subject matter of this suit, or of any of the parties thereto as being a controversy arising under the Constitution or laws of the United States, or treaties made under their authority.

3. For that said bill is vague and uncertain in this: that it does not appear from said bill whether the rates prescribed in and by the ordinance of the defendant, the City of Los Angeles, a copy of which is annexed to said bill and marked Exhibit "D," are reasonable or unreasonable, just or unjust; nor whether the rates prescribed
65 in and by the ordinance of the defendant the City of Los Angeles, a copy of which is annexed to said bill and marked Exhibit "E" are reasonable or unreasonable, just or unjust.

And with all the protestations and reservations aforesaid, these defendants demur to Paragraph XVIII of said bill for that the same is vague and uncertain in this: that it does not appear therefrom how or in what manner the adoption or enforcement of the ordinance of said City, a copy of which is annexed to said bill and marked Exhibit "C," or of the ordinance of said City, a copy of which is annexed to said bill and marked Exhibit "D" will, if permitted by this Honorable Court, impair the obligation of contract, copy of which is annexed to said bill marked Exhibit "B," or deprive the said complainant of its property without due process of law or will abridge the privileges and immunities of said complainant or deprive it of the equal protection of the law, or how or in what manner the adoption of the ordinance of said City, a copy of which is annexed to said bill and marked Exhibit "D," or ordinance of said City, a copy of which is annexed to said bill marked Exhibit "E," will deprive said complainant of the equal protection of the law or discriminate against the complainant in favor of the Sunset Telephone and Telegraph Company, mentioned in said bill, or how or in what manner the adoption of either of the two last mentioned ordinances of the defendant, the City of Los Angeles, is in violation of Article 1, Section 10, Clause 1 of the Constitution of the United States, or of the 14th Amendment of said Constitution, or of any part or provision of said Constitution, or is in violation of the Constitution of the State of California.

Wherefore, and for divers other errors and imperfections appearing in said bill these defendants demand the judgment of this
66 Court whether they shall be compelled to further answer said bill or said portions of said bill hereinabove demurred to; and pray to be hence dismissed with their reasonable costs in this behalf sustained.

W. B. MATHEWS,
*Solicitors for the Defendants Herein.*

hereby certify that the foregoing demurrer is, in my opinion, ounded in point of law.

W. B. MATHEWS,
*Solicitor for Defendants.*

ED STATES OF AMERICA,
*Southern District of California,*
*County of Los Angeles, ss:*

B. Mathews being duly sworn on oath says, that he is an officer City of Los Angeles, one of the defendants in the foregoing rrer, to-wit: the City Attorney of said defendant, and is the ey in this suit for all of the defendants herein, and as such and attorney makes this affidavit for and on behalf of said dants; and that the foregoing demurrer is not interposed for

W. B. MATHEWS.

scribed and sworn to before me this 14th day of May, 1906.

E. E. BOSTWICK,
SEAL.] *Notary Public in and for the County of Los Angeles, State of California.*

ndorsed:) No. 1243. In the Circuit Court of the United States d for the Southern District of California, Southern Division of California Home Telephone and Telegraph Company, a ration Plaintiff *vs.* The City of Los Angeles etc. *et al.* Defend- Demurrer Received Copy of the within this 14 day of May Oscar A. Trippet Attorney for Complainant Filed May 14 Wm. M. Van Dyke, Clerk Chas. N. Williams Deputy W. B. ws City Attorney City Hall Los Angeles, Cal. Attorney for dants.

In the Circuit Court of the United States, Southern District of California, Southern Division.

ME TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Complainant,
*vs.*
CITY OF LOS ANGELES, a Municipal Corporation; A. C. HARPER, Mayor Thereof; and R. W. DROMGOLD, EDWARD A. CLAMPITT, ALTER J. WREN, NILES PEASE, A. J. WALLACE, HENRY H. NKIN, HENRY LYON, BERNARD HEALY and EVERETT L. BLAN- ARD, as Members of the Common Council Thereof, Defendants.

*that Bill Stand as Filed, and Decree Dismissing the Same.*

on the stipulation of complainant and defendants It is hereby ed that the amended and supplemental bill of complaint filed he complainant may stand as such, and that the defendants Harper, as Mayor of said City of Los Angeles, and R. W. gold, Edward A. Clampitt, Walter J. Wren, Niles Pease, A.

J. Wallace, Henry H. Yonkin, Henry Lyon, Bernard He
Everett L. Blanchard, as members of the Common Council
defendant, the City of Los Angeles, be substituted as defend
successors in office of the defendants mentioned in the origi
of complaint.

And it is further ordered that the demurrer heretofore filed
to the bill of complaint may stand as a demurrer to the amen
supplemental bill of complaint, and said cause be submitte
said demurrer.

It is further ordered and adjudged that that part of said
rer in which the jurisdiction of this court is put in issue,
ruled, and the court assumes jurisdiction of said cause, a
demurrer is sustained as to the other grounds of de

68 Now this court doth order that the complainan
amended and supplemental bill of complaint do sta
missed out of this court, with costs to be paid by the complai
the said defendants, and said costs to be taxed.

OLIN WELLBORN, *J*

Costs taxed at $31.00.

Decree entered and recorded August 5, 1907.

WM. M. VAN DYKE, *C*

(Endorsed:) No. 1243 Dept. In the Circuit Court of the
States, Southern District of California, Southern Division.
Telephone and Telegraph Company, Complainant, *vs.* The
Los Angeles, *et al.*, Defendants. Order that Bill stand as fi
decree dismissing same. Filed Aug. 5 1907 Wm. M. Va
Clerk A. B. McCutcheon. Oscar A. Trippett 316 Tajo B
307 W. 1st St. Los Angeles, Cal. Attorney for Complainant.

69 In the Circuit Court of the United States, Ninth
Southern District of California, Southern Division.

No. 1243. (In Equity.)

THE HOME TELEPHONE & TELEGRAPH COMPANY, a Corp
Complainant,
*vs.*
THE CITY OF LOS ANGELES, a Municipal Corporation, *et*
Defendants.

Demurrer to the Bill.

*Statement of Facts.*

This suit was brought to restrain the enforcement of tw
nances attached to the bill respectively as Exhibits C and
hereinafter more fully set forth.

The allegations of the bill are substantially as follows:

The city of Los Angeles exists, and since 1888 has existed
a freeholders' charter.

70 That by Section 2 of said charter, said city is vested with power to provide and maintain a proper and efficient fire department, and make and adopt such rules and regulations for the preservation of property endangered by fire as may by it be deemed expedient, and to make and enforce within its limits local police, sanitary and other regulations deemed by it expedient to maintain the public peace and protect property, and to exercise all municipal powers necessary to the complete and efficient management and control of municipal property and for the efficient management of the municipal government, whether such powers be expressly enumerated in such charter or not, except such powers as are forbidden or are controlled by general laws.

That all legislative power of said city is vested in the city council, subject to the power of veto and approval by the mayor.

That under Section 31 of said charter, said council has power by ordinance to regulate telephone service and the use of telephones within the city and to fix and determine the charges for telephone and telephone service and connections, and to prohibit or regulate the erection of poles for telephones, telegraph or electric wires in the public grounds, streets or alleys of said city, and the placing of wires thereon, and to require the removal from the public grounds, streets or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone or electric wires.

That by Section 33 of said charter the council is required by ordinance to provide for maintaining a fire alarm and police telegraph system.

That "it is further provided in and by said charter that said council shall also have full power to pass ordinances making
71 contracts and upon any other subject of municipal control or to carry into effect any other powers of the municipality."

That prior to December the 9th, 1901, an application was filed with the governing or legislative body of defendant by M. A. King for a franchise to construct, maintain and operate a telephone system, and that, on the 6th day of February, 1902, an ordinance, attached to the bill as Exhibit B was passed granting said franchise, and that all the steps and proceedings required by law and the provisions of said charter for the advertisement and sale of said franchise and the approval thereof, and all other matters connected therewith were duly had and taken.

That, by regular assignments from M. A. King and others, plaintiff became and now is the owner of said franchise and telephone system.

That immediately upon the taking effect of said ordinance as aforesaid, the assignors of this plaintiff, pursuant to the terms thereof, commenced the work of constructing and laying down the conduit required by said ordinance in the district therein described, and continuously prosecuted said work in good faith and completed the same in full compliance with the conditions of said ordinance relating thereto, and within the period therein prescribed, so that within said period a complete conduit system was established of sufficient capacity and extent to accommodate at least 10,000 sub-

scribers and to provide a general telephone service in all parts of said telephone conduit district, and that likewise the said assignors of this plaintiff did, pursuant to the terms and conditions of said ordinance and in good faith expend for material and labor used and performed in the construction and installation in connection therewith of wires, switchboards and telephonic apparatus and appliances, and within the times specified in said ordinance sums greatly in excess of the sums therein specified to be so expended, and did so expend
72 more than the sum of $200,000 within thirty-six months after the grant of said franchise.

That the assignors of plaintiff did also, within the periods of said ordinance provided, after the grant of said franchise, file a statement, verified as therein provided, showing in detail the sums expended as required by and in compliance therewith, and did also cause to be erected and maintained poles of a size and character satisfactory to the street superintendent of said city of Los Angeles, and that the assignors of said plaintiff and this plaintiff have executed and complied with and observed, and that the said defendant, the city of Los Angeles, has never at any time claimed or pretended that plaintiff's assignors and this plaintiff had not executed, complied with and observed the terms, covenants and provisions of said ordinance as aforesaid.

That all of the work done and performed by plaintiff's assignors and by this plaintiff as aforesaid, and the expenditures made by it for any and all equipment and appliances as aforesaid, were made, done and performed pursuant to and in reliance upon the terms, covenants and provisions of said ordinance No. 6959 of said city of Los Angeles, and not otherwise; and that the system of plaintiff in said city of Los Angeles is now and at all times has been maintained and operated pursuant to and in reliance upon the terms, conditions and covenants of said ordinance and not otherwise, and that plaintiff has no rights or property in the said city of Los Angeles except such as were acquired under the said ordinance No. 6959.

That pursuant to the powers vested in it by law and the provisions of said charter, and in order to provide for maintaining a fire system and police telegraph system, the said defendant the city of Los Angeles required in and by Section 8 of the said ordinance that this plaintiff should furnish to the said city of Los Angeles, if
73 required by it, free of any charge at all during the life of the said franchise granted by said ordinance, the use of all necessary conductors, not exceeding 150 pairs in said conduit, for the uninterrupted use of a fire system and police system of said city, and for like purpose the free use of the top cross arm on each of the poles erected or maintained under said franchise during the whole term thereof; that this plaintiff in constructing and laying said conduits and in constructing and erecting its pole lines and in providing its equipment, made provision for said 150 pairs of lines in said conduits and for the maintenance and operation thereof, and provided that said top cross-arms on each of said poles, and in all respects and at additional cost and expense to it arranged to comply with such provisions of said ordinance, and is now, and at all times

been, able and willing to furnish said conductors, and has as
esaid reserved the top cross-arm on each of said poles for the use
aid city.
hat it is also provided in and by Section 8 of said ordinance that
e shall be furnished to the said City of Los Angeles, free of any
rge, 30 telephones which shall be connected with the telephone
em of plaintiff, and that this plaintiff did, within the time pro-
d and specified in said franchise, so furnish to the defendant
30 telephones, and did connect the same with the telephone sys-
of this plaintiff, all at its own cost and expense, and without
rge to the said city of Los Angeles, and that said city of Los
geles is now, and ever since has been, using free of charge as
esaid the said 30 telephones.
hat section 1 of said ordinance provides:
The said conduit, said poles, and the wires enclosed therein or
ched thereto, shall be constructed, erected and installed, and at
all times maintained, and said right, privilege and franchise
is hereby granted, and shall at all times be exercised and en-
joyed, in accordance with the subject to each and every of the
s of this ordinance and not otherwise."
hat Section 9 of said ordinance provides:
That all telephone lines constructed or operated under said fran-
e shall have complete copper metallic circuits, and that the con-
system constructed and laid down under said franchise shall be
uch size and capacity as to accommodate wires, cables and
tors, sufficient to provide for ten thousand telephones.
That the rent or charge for unlimited, independent, meta' cir-
telephone service, in the system established or maintain under
franchise so long as said system does not connect and exchange
more than 10,000 telephones, shall not exceed $50 per annum
a telephone installed in any business office or premises, or $30
annum for a telephone installed in a private residence, and that
n said system shall comprise more than 10,000 telephones, the
ual rental or charge for the telephone service shall not be in-
sed by more than a sum equal to $6.00 per annum for each one
sand telephones in said city connected with said telephone sys-
in excess of 10,000."
hat the rate established by said franchise was at said time lower
any which had ever been charged for telephones in said city,
lower than any other company than plaintiff now charges for
phone service in said city, and that there was not at any of the
s herein mentioned, any system of telephone lines with complete
per metallic circuits, other than the system of plaintiff. That at
time of the advertising and sale of said franchise, there was in
ation in said city of Los Angeles, one system of telephonic com-
nication only, and that the corporation owning the same continues
o business in said city. That at the time said franchise was ad-
ised for sale and sold the city required the use of 150 pairs of
lines as provided for in said franchise, and the use of the top
cross arm of each pole to be erected under said franchise for
the fire alarm and police telegraph system of said city, and

said city needed the use of thirty telephones, as provided in said franchise; and all of said telephones have been used by the said city ever since the construction of said plant of plaintiff, and are now used by the city, and the city is using some of the lines in the conduit of plaintiff, and the top cross-arm of some of its poles, and the city has need for the things it is using as aforesaid, for public benefit and in the discharge of its functions.

That by Section 10 it is provided that the owner of said franchise shall in no way enter into any combination at any time, directly or indirectly, with any person or persons, or any corporation, concerning the rate to be charged for telephone or telegraph service.

That the reasonable value to the said city of Los Angeles of the use of said 30 telephones provided by said franchise to be furnished free of charge, and the free use of one hundred and fifty pairs of lines for the fire system and police telegraph system of said city, and the free use of the top cross-arm on each of the poles erected and maintained under said franchise, are and will be during the life of said franchise of the sum of four hundred and fifty thousand dollars. That two per cent. of the gross annual receipts required by said franchise to be paid to the city of Los Angeles will amount to more than the sum of five hundred thousand dollars.

That the plaintiff and its assigns, acting under and pursuant to the terms of this franchise and not otherwise, and particularly *on* the clauses thereof declaring maximum rates, have constructed more than five miles of underground conduit and constructed more than one hundred miles of pole lines, and have installed more than twenty thousand telephones in said city, and did, in compliance with
76 said franchise, and at great additional expense, construct and erect and is now operating a system of telephone lines having complete copper metallic circuits.

That, on March 27th, 1905, the city council of said city passed an ordinance, which is attached to the bill, marked Exhibit C, the twelfth section of which provides as follows:

"SEC. 12. It is hereby made the duty of every person, firm or corporation supplying telephones, telephone service or telephone connections to the city of Los Angeles or its inhabitants, to furnish to the city council in the month of January of each year, a statement in writing verified by the oath of such person, or of a member of such firm, or of the president or secretary of such corporation, as the case may be, showing in detail the amount received by such person, firm or corporation from the renting of telephones, the furnishing of telephone service and the making of telephone connections within the city of Los Angeles, and the revenue derived by such person, firm or corporation, or in any manner arising from the use or operation of a telephone system in the city of Los Angeles, in connection with a telephone system outside of the city of Los Angeles, during the year preceding the date of such statement, and showing in detail all expenditures made by such person, firm or corporation, during the same time for supplying telephones, telephone service and telephone connections to the city of Los Angeles and its inhabitants, and for the

hase, construction and maintenance respectively of the property
ssary for the carrying on of such business.
Every such person, firm and corporation shall furnish a detailed
ment verified in like manner as the statement, hereinbefore in
section mentioned, containing an itemized inventory of all the
s, lines, plant and property owned or used by such person, firm
or corporation and necessary or convenient to the carrying
on of the business or supplying telephone, telephone service
and telephone connections to the city of Los Angeles, or to
nhabitants thereof, and showing the actual cost and present cash
e of each item thereof."
hat plaintiff has not complied with said Section 12 of Ordinance
or any part thereof, and plaintiff declines to comply therewith
he reasons herewith set forth.
hat said city has arrested and commenced prosecutions against
ntiff's officers and will continue to arrest and prosecute plaintiff's
ers for violations of ordinance C, unless restrained therefrom.
hat defendant, on February 28th, 1906, passed an ordinance
h is attached as Exhibit D to the Bill, fixing rates to be charged
laintiff for telephone service and forbidding plaintiff, under
lty of imprisonment, from collecting the rates provided and fixed
rdinance exhibit B, and will, unless restrained by this court, con-
e from time to time to pass other similar ordinances.
hat the said city, on February the 28th, 1906, adopted another
nance, attached to the bill as exhibit E, whereby a competitor
laintiff in said city, engaged in like business, was allowed to
ge for telephone services sums greatly in excess of that which by
ordinance D plaintiff is permitted to charge.
hat ordinances C and D, if carried into execution, will impair the
gation of a contract, exhibit B, and deprive plaintiff of its prop-
without due process of law, and abridge the privileges and im-
ities of this plaintiff, and deprive it of the equal protection of
law, and, that the adoption of said ordinances exhibits D and E
g the different rates to be charged for the same services deprives
ntiff of the equal protection of the law and discriminates against
ntiff in favor of the Sunset Telephone and Telegraph Company,
nilar corporation, all of which is in violation of the Constitution
of the United States, and particularly in violation of Article
I, Section 10, Clause 1 of said Constitution of the United
States, and the Fourteenth Amendment thereto, and also is
iolation of the Constitution of the State of California.
hat said ordinance D is void, for that it is not a general law
pted by said city for the government of all corporations similar
haracter to plaintiff, but is directed solely against, and applica-
to plaintiff, and discriminates against plaintiff.
hat said ordinances D and E are void, for that said city never
, under the Constitution and laws of the State of California,
power or authority to regulate or fix rates to be charged by
hone corporations for services rendered by them, except that
city of Los Angeles had and has the power to contract for rates

to be charged, and had and has the right to contract in the n
and form as shown by said ordinance Exhibit B.

That, if the provisions of said charter operate to give the
Los Angeles the right to fix rates other than by contract or p
or attempt to give it a continuing power to fix and regulat
of this plaintiff, such provisions of said charter are void, fo
in and by the Constitution of the State of California the powe
such rates, if such power exists at all, can only be exercised
thority of a general law applicable to all municipalities and
ing all corporations similar to plaintiff, and, that the legisla
the State of California has no authority by virtue of said C
tion or otherwise, to delegate the power of so fixing rates fro
to time to any one municipality or other political sub-divi
all, to the exclusion of the others, and has no authority by
tion of its powers to fix the rates to be charged by plaintiff.

That the legislature of said State of California has never
nor is there now, nor has there ever been in force any general
statute authorizing the fixing or regulation of rates a
79 said, but that such general power has been and is w
from other cities and municipalities within the State.

Ordinance D is as follows:

"EXHIBIT D."

*Ordinance No. —.*

(New Series.)

"An ordinance fixing the rates to be charged and collected
Home Telephone and Telegraph Company, a corporati
telephones, telephone service and telephone connections,
city of Los Angeles, during the year commencing July 1s
and ending June 30th, 1907.

"The Mayor and Council of the City of Los Angeles do o
follows:

"SECTION 1. That the rates to be charged and collected
Home Telephone and Telegraph Company, a corporation,
phones, telephone service and telephone connections in the
Los Angeles, furnished to the city of Los Angeles, or to the
tants thereof, for the year commencing on the 1st day of Jul
and ending on the 30th day of June, 1907, are hereby fixe
lows:

"(1) For each telephone installed and maintained in a
ness office or premises, connected with the central exchang
independent or individual circuit, with unlimited service, $
month.

"(2) For each telephone installed and maintained in an
or place other than a business office or premises, connected
central exchange by an independent or individual circuit,
limited service, $2.00 per month.

"(3) For each extension telephone, $1.00 per month.

"(4) For each private telephone exchange connected with the central exchange by an independent circuit on one trunk line, $5.00 per month; and for each additional trunk line, $4.00 per month; and for each telephone station in such private exchange, $1.00 per month.

80 SECTION 2. Any person who shall charge, demand, collect or receive, either as officer, agent, collector or employee of the said Home Telephone and Telegraph Company, any rate or compensation for telephones, telephone service or telephone connections in the city of Los Angeles, furnished by the said Home Telephone and Telegraph Company to the city of Los Angeles or to any inhabitant thereof, during the year commencing on the 1st day of July, 1906, and ending on the 30th day of June, 1907, in excess of the rates fixed by this ordinance, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punishable by a fine in a sum not exceeding one hundred dollars, or by imprisonment in the City Jail for a period not exceeding ninety days, or by both such fine and imprisonment."

There is no express provision in the charter conferring upon the city contractual power, as alleged in the bill, and presumably that allegation is the statement of the pleader's conclusion as to an implied power. However, this matter, as appears from the opinion of the court, is immaterial here.

*Opinion of the Court.*

Plaintiff cites numerous authorities showing this to be a case of equitable and also of Federal cognizance.

Defendants, however, have not suggested any lack of jurisdiction in either respect, nor is there any ground for such contention. No further reference, therefore, will be made to plaintiff's authorities on this point.

The questions about which the parties are at issue may be
81 conveniently grouped under three general heads, as follows:

First. Did the laws of the State of California, at the time of the passage of the ordinances attached to the bill as Exhibits C and D, and here sought to be annulled, the former requiring telephone companies to report to the City Council their receipts, expenditures and value of plant, and the latter fixing the rates to be charged by plaintiff for telephone service, confer upon the city of Los Angeles power to regulate charges for such service?

Second. Was such power, if the city possessed it, bargained away by the ordinance No. 6959, Exhibit B to the Bill, which granted to M. A. King, plaintiff's assignor, the franchise under which plaintiff is now operating?

This question is included in the next one, and a strictly logical arrangement would require its assignment there, but, on account of its importance, indeed pivotal character, I have given it a separate heading.

Third. Do said ordinances Exhibits C and D, contravene that clause of Sec. 10, Art. I of the Constitution of the United States, which forbids any State to pass a law impairing the obligations of contracts, or those provisions of the Fourteenth Amendment to said Constitution, which forbid a State to deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws?

These questions will be considered in the order in which they are propounded, and references hereafter to the ordinances attached to the bill will be by the letters which distinguish them respectively as exhibits.

I. That a State has power to regulate charges for telephone service, is well settled. (Munn *vs.* Illinois, 94 U. S. 113; Chicago, etc.,
82 T. R. Co. *vs.* Iowa, 92 U. S. 155; Spring Valley W. Co. *vs.* Schottler, 110 U. S. 347; R. R. Commission Cases, 116 U. S. 307; Rudd *vs.* New York, 143 U. S. 517; Hockett *vs.* State, 105 Ind. 259; Knoxville *vs.* Knoxville W. Co. 107 Tenn. 650); and it is equally well settled that this power may be delegated to municipalities. (Des Moines Gas Co. *vs.* Des Moines, 44 Iowa 105; People *vs.* Suburban R. R. Co. 178 Ill. 594; St. Louis *vs.* The Bell Telephone Co., 96 Mo. 623; McQuillan on Municipal Ordinances, Sec. 583; Danville *vs.* Danville Water Co., 180 Ill. 233.)

The remaining question for determination here is this: Was said power, at the times of the adoption of said ordinances, vested in the city of Los Angeles, by delegation from the State of California? Section 31 of the Charter of said city, then & now in force, is as follows:

"SEC. 31. The Council shall have power, by ordinance, to regulate and provide for lighting of streets, laying down gas pipes and erection of lamp posts, electric towers and other apparatus, and to regulate the sale and use of gas and electric light, and fix and determine the price of gas and electric light and the rent of gas meters within the city, and regulate the inspection thereof, and to regulate telephone service, and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service, and connections; and to prohibit or regulate the erection of poles for telegraph, telephone or electric wires in the public grounds, streets or alleys, and the placing of wires thereon; and to require the removal from the public grounds, streets or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone or electric wires."

Plaintiff's contention, that the power conferred is only a power to fix and determine charges once for all, that is, permanently, by contract, cannot be sustained. Certainly no such limitation is
83 expressed, nor can it be reasonably inferred. The words themselves, "fix and determine," when applied to rates, fairly import a continuing power of regulation. (Atlantic & Pacific R. R. Co. *vs.* U. S., 76 Fed. 186.)

The terms "by ordinance" in said section are hardly appropriate to denote a contractual method for the exercise of the power they qualify, but do suitably designate power of a legislative character.

This view is strengthened by Section 12 of Article III of the city charter, which provides, that "All legislative power of the city is vested in the council, subject to the power of veto and approval by the mayor, as hereafter given, and shall be exercised by ordinance; other action of the council may be by order upon motion."

If, however, the language of Section 31 were ambiguous, the doubt should be resolved in favor of that construction which makes the power a continuous one. This precise question was authoritatively decided in the case next below cited, and a precedent more directly in point is rarely found. There the phraseology of the statute under consideration was, that the city council shall have power "to authorize any person or private corporation to construct and maintain the same "(water works)" at such rates as may be fixed by ordinance and for a period of not exceeding thirty years." The opinion in the case quotes a previous construction by the Supreme Court of Illinois, that "the meaning of this language is not that the water works are to be maintained at such established rate as may be fixed by one ordinance for a period not exceeding thirty years. The clause 'for a period not exceeding thirty years' qualifies the words 'construct and maintain the same' but does not qualify the words 'at such rate as may be fixed by ordinance,'" and then proceeds as follows:

"The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public the court applied the rule declared in many cases. We said in the Railroad Commission Cases, 116 U. S. 307, 325, by Chief Justice Waite, of the power of the regulation of rates:

"'This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law
84 equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in Providence Bank *v.* Billings, 4 Pet. 514, 561, "Its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon does not appear." This rule is elementary, and the cases in our reports where it has been considered and applied are numerous.'

"These remarks are obviously applicable to the Illinois statutes. The question is whether the power given to the municipalities of the State was to be continuing or occasional, indeed only special in its purpose, intended to have but one exercise and then bound in contract for thirty years. If the latter had been the intention it would have been natural to express it. The fullness of sovereignty can be taken for granted, and naturally would be and should be taken for granted. An example is afforded by the act of June 6, 1891. By that act the corporate authorities of any city which have authorized or shall authorize any individual, company or corporation to supply water, 'be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation. * * * ' There is no explicit provision for repetitions of the power—none de-

claring the power conferred a continuing one. Who now dou
that it is? If rights were claimed and were pleading for a differ
interpretation we might have to listen to them, but now undistur
by them we yield without resistance to that meaning which the s
ject-matter demands in the absence of negativing words.

"Our conclusion is that the powers conferred by the statutes
1872 can, without straining, be construed as distributive. The
council was authorized to contract with any person or corporation
construct and maintain waterworks 'at such rates as may
85 fixed by ordinance, and for a period not exceeding thi
years.' The words 'fixed by ordinance,' may be construe
mean by ordinance once for all to endure during the whole per
of thirty years; or by ordinance from time to time as might
deemed necessary. Of the two constructions that must be adop
which is most favorable to the public, not that one which would
tie the hands of the council that the rates could not be adjusted
justice to both parties might require at a particular time." (F
port Water Co. *ex.* Freeport, 180 U. S. 599.)

The various reasons, which plaintiff urges in detail against the
plicability of said case to the one at bar are not convincing, wh
the claim, quoting from plaintiff's brief, "that the Freeport case
been virtually overruled by the Supreme Court in the Detroit st
car case, and the Cleveland street car case both of which cases w
unanimously decided by the Supreme Court after the Freeport ca
is certainly untenable in view of the fact, that the opinion in
Detroit case, which was written by Justice Peckham, one of the
senting justices in the Freeport case, cites approvingly the Freep
case (Detroit *vs.* Detroit Cit. St. Ry. Co., 184 U. S. 368, 382), and
opinion in the Cleveland case, which was written by Justice Wh
who wrote the dissenting opinion in the Freeport case, cites
provingly the Detroit case (Cleveland *vs.* Cleveland C. Ry.
194 U. S. 517-536). The opinions in the Detroit and Clevela
cases show, that the Supreme Court had before it in each case
Freeport decision, and yet neither of the two last mentioned Justi
expressed any continuing dissent from the Freeport case, but on
contrary Justice Peckham refers to said case with seeming approv

So also plaintiff's contention, that the Broughton Act contempla
the fixing of rates only by contract for the whole term of
86 franchise, directly conflicts with the rule and authority ab
enunciated and cited, and is, therefore, without merit.

Plaintiff's argument, that such regulation, as an exercise of le
lative power, cannot be a municipal affair, because it works unlaw
discrimination between competing corporations, and violates s
division XIX of Section 25, Article IV, and Section 24 of Articl
of the State Constitution, and, that equal protection of the law as
rates can be had only when by general statutes they are made u
form throughout the State, is not well grounded. The local con
tions of public utilities, such as value of plant, costs of maintena
and operation, etc., are so variant in different places, that rates,
reasonable, cannot be the same in all localities. From this c
sideration, it follows, that municipalities should be allowed resp

tively to fix rates within their corporate limits, and it was to promote and apply this salutary doctrine to all matters of local concern, that the provisions of Sec. 8, Art. XI of the Constitution, authorizing freeholders' charters were ordained as organic laws. Uniformity is the very thing these charters are designed to avoid, and dissimilarity their essential idea.

The Supreme Court of California on this subject has said:

"It may be true, that the freeholder charter scheme confers greater influence in legislative matters upon the inhabitants of the favored cities than is enjoyed by the people who do not reside in said cities. The inhabitants of the favored cities may participate in making laws for others which have no operation at all as to them, while the outsider, when the charter has been once made has no voice in making such laws for those within the city even when he is vitally and directly interested in them; but if this be an inequality the people have themselves made it and if a remedy is needed they alone can provide it." (People *vs.* Williamson, 135 Cal. 115.)

87 Nor is there anything contrary to these views in Sec. 6, Art. XI of the Constitution, for the simple reason, that the regulation of the charges of a public service corporation within the limits of a city, is a "municipal affair."

Streets of a city are public highways, in which the people of the whole State are interested, yet the opening and widening of streets are "municipal affairs." (Beyrne *vs.* Drain, 127 Cal. 663.) The regulation of telephone rates in a city would seem to be more nearly a matter of local concern than the control of streets.

On this point, plaintiff continues as follows:

"Our construction is reinforced by the consideration of other provisions of the same instrument. Sec. 33 of Art. IV of the Constitution provides:

"'The legislature shall pass laws for the regulation and limitation of the charges for services performed and furnished by telegraph companies * * * and where laws shall provide for the selection of any person or officer to regulate or limit such rates, no such person or officer shall be selected by any corporation or individual interested in the business to be regulated, and no person shall be selected who is an officer or stockholder in any such corporation.'

"It is plain that by this provision it was not intended to regulate or limit the charges of telegraph companies except by general laws. State *vs.* Mayor, 85 P. R. 744."

Plaintiff, through inadvertence, erroneously quotes the first clause of said section, which is as follows:

"The legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations," etc.

88 The omitted words "and gas corporations" are very significant. If plaintiff's interpretation of the constitutional provision above quoted be correct then gas corporations cannot be regulated or limited in their charges except by general laws, whereas plaintiff shows, that by Section 19 of Article II the fixing of gas rates is a municipal affair. Moreover, if there were no such constitu-

tional provisions in reference to gas companies, it is manifest, t
the fixing of gas rates throughout the various cities of the State b
general law would be impracticable, and, that it is a matter prope
if not necessarily, confided to the respective municipalities.

Plaintiff repeats its erroneous construction of said section as
lows:

"Referring again to Section 33 of Article IV of the Constitution
California above quoted, we desire to call the attention of the c
to the fact that that section applies to telephone companies.
section refers only to telegraph companies, but telegraph compan
and telephone companies stand upon the same footing, and the l
guage used in constitutions and statutes referring to telegraph c
panies applies to and binds telephone companies.

"Joyce on Electric Law, Sec. 8;

"David *vs.* Pacific States Telephone Company, 127 Cal. 3

"The foregoing California decision on the subject necessa
settles the construction of the above section of the constitution.
plain, therefore, that the framers of the constitution regarded
regulation of telephone and telegraph charges as not a munici
affair, but provided that the same should be done by general and u
form laws, and evidently contemplated that it should be done
some sort of a commission. It is plain that the fixing of teleph
rates cannot be a municipal affair, while the above provision of
constitution of the State of California is in force. It clearly and
tinctly requires the legislature to pass the laws, and we thin
89 would be a violation of the plain provisions of that sectio
the constitution for the legislature to divest itself of this po
by delegating it to a municipal corporation."

No one will claim, that it was ever contemplated by the const
tion, that gas rates should be regulated by a general law, or throu
the agency of a commision, and the truth is Sec. 33 of Article
above quoted does not contemplate the accomplishment of its p
poses by a general law, or through commissions, but by suitable d
gations of power to municipalities.

I am clearly of opinion, that the city of Los Angeles, when s
ordinances were adopted, was authorized by its charter and the C
stitution of the State to regulate charges for telephone service, a
that the authority thus conferred upon the city was as ample as t
possessed by the legislature, and, that this conclusion results, e
though the grant of said authority be considered solely as a dele
tion from the legislature.

There are strong reasons, however, for a broader and more libe
construction of a freeholders' charter than is usually given t
grant solely from the legislature. The Supreme Court of the S
has said:

"The power of cities under charters to raise money by taxat
for municipal purposes does not find its source in any grant by
legislature, but has been directly granted by the people of the S
by the provisions of the Constitution." (*Ex parte* F. W. Braun,
Cal. 204; Security Savings, etc., Co. *vs.* Hinton, 97 Cal. 214;

*parte* Pfahler, 88 Pac. Rep. 270; St. Louis *vs.* Dorr, 145 Mo. 466; St. Louis *vs.* Western U. Tel. Co. 149 U. S. 467.)

The power acquired by a municipality under a freeholders' charter, so far as concerns its interpretation, is not unlike that conferred by Section 11 of Article XI of the State Constitution upon
90 municipal corporations to pass local police and sanitary regulations, and it has been repeatedly held, that, in the latter case, the power is a direct grant from the people and not merely an authority delegated by the legislature. (*Ex parte* Roche, 104 Cal. 272; *Ex parte* Lacey, 108 Cal. 326; Denninger *vs.* Recorder's Court, 145 Cal. 626; Odd Fellows Cem. Ass'n *vs.* S. F., 148 Cal. 226.)

Such a charter being an organic act, and so declared by the Constitution, should not the powers of the city thereunder like those of the legislature of the State, be liberally interpreted?

It is unnecessary, however, to pursue this line of thought further. Section 31 of the charter of the city of Los Angeles is so clear and unambiguous in conferring upon said city control of telephone rates, that there is no occasion to invoke collateral aids to interpretation (McPherson *vs.* Blacker, 146 U. S. 27), and, therefore, it is immaterial whether said Charter be considered a grant by the legislature or direct emanation from the people.

I am further of opinion, that ordinance C, requiring telephone companies to report to the city council value of plant, receipts and expenditures, is an appropriate, if not necessary means for carrying into effect the power of regulation conferred by Section 31 of the charter, and, therefore, power to pass said ordinance is included in said power of regulation.

Plaintiff's claim, that the power of regulation, if conferred, was given to the council as a commission representing the State, independent of the city, and, that the council, as a commission, being without legislative power, could not lawfully pass ordinance C, is untentable.

Careful reading of all the sections of Article III of the city charter satisfies me, that the power to regulate rates conferred by sec-
91 tion 31 of said article is given to the council not as a commission but as the legislative or governing body of the city. For instance, Article III of the Charter begins with the declaration, in section 12, "The legislative power of the city is vested in the council, subject to the power of veto and approval by the mayor as hereafter given and shall be exercised by ordinance; other action of the council may be by order upon motion."

Then, following in its order, is the provision in section 31 of said Article authorizing the council to regulate rates as follows: "The council shall have power by ordinance * * * to fix and determine charges for telephones and telephone service," etc.

Reading these sections together, it seems to me, that there is no room for controversy but that the powers conferred by Section 31 were given to the council as the legislative or governing body of the city, and not as a commission.

This view is not only shown, however, by a careful perusal and comparison of the various sections of said article of the Charter, but

is confirmed by the authority which plaintiff itself cites to the op
site contention, namely Jacobs *vs.* Supervisors, 100 Cal. 121-1
At the latter page the court says:

"At the time the section was adopted there was no city and cou
or city or town other than the city and county of San Francisco
which a board of supervisors was the legislative department; and
may well be presumed that the constitutional convention, at t
time, had particularly in view the city and county of San Franci
when they expressly granted to the board of supervisors the po
to establish water rates. But as there were some, and might in
future be other, cities and towns of whose government boards
supervisors did and might not constitute a part, and as other c
solidated city and county governments could be establis
92 in the future whose legislative department might or mi
not be boards of supervisors, it was necessary, also, to prov
for the fixing of water rates in those kinds of municipalities.
so the section, after declaring that water rates 'shall be fixed annu
by the board of supervisors,' (that is, of course, when such board
or should be a part of the government), proceeded to provide, a
that in municipalities having no boards of supervisors, the 'ot
governing body' thereof should fix the rates. It is difficult to c
ceive how any other construction can be put upon the section w
out entirely eliminating therefrom the prominent and conspicu
words 'board of supervisors.'"

It follows, from the foregoing views, that ordinances C and
are both valid, unless the power of regulation conferred by the l
laws upon the city had been previously surrendered by contrac
is in contravention of some provision of the Federal Constitut
and these two questions will be considered in the order in which t
have been named.

II. I now come to the second question propounded in the ou
of this opinion, namely, did the city of Los Angeles, by ordinanc
surrender or suspend its power to regulate plaintiff's charges for
phone service?

The power to abandon or suspend its control of rates is
expressly given the city of Los Angeles either by its charter or
Broughton Act, (Stats. of California 1901, page 267). It is arg
however, by plaintiff, that, in this age, telephone systems are an
the appropriate instrumentalities for providing and maintain
suitable fire and police departments, and otherwise promoting
efficient administration of municipal government, and, there
the power to contract for telephone rates is inferable from Sec
17, 22 and 23 of said charter.

It is also argued on behalf of plaintiff, that this power to cont
for rates is to be implied from the Broughton Act, provi
93 for the sale of franchises, on the ground, that a sale im
a price. It may well be doubted, however, whether or
authority to provide and maintain suitable fire and police de
ments, or the more comprehensive authority to efficiently admin
the municipal government, as conferred by the city charter
whether or not the sale of franchises as authorized and provided

by the Broughton Act, necessarily or reasonably include authority to surrender municipal control over rates. These provisions of the charter and the Broughton Act are unlike the charter provision in Los Angeles City Water Co. *vs.* Los Angeles, 88 Fed. 720, from which the court inferred power to fix rates contractually. There the express provision of the charter was, that the city council "shall have the power * * * to provide for supplying the city with water."

It may be, that whatever doubts arise on this question should, under the well recognized rule of construction hereinbefore referred to, be resolved against the claimed grant of power and favorably to its retention by the State. However, for the purpose of this hearing, it will be conceded, without further consideration or any decision of the question, that the city, when plaintiff's franchise was granted, had authority by contract to abridge or abandon its control of telephone rates, and it is, therefore, needless to enquire whether, in granting said franchise, it acted in a proprietary or legislative capacity, or derived its authority from charter provisions or general laws. It is important, however, to determine the character of the power to regulate rates, since this fixes the rule of construction applicable to cases where abandonment or suspension of the power is claimed.

The power of the state to regulate public utilities, including rates, cannot be otherwise than a power of legislation. Where this
91 power has been admittedly conferred upon a city, and the city adopts a suitable ordinance, in execution of this power, such an ordinance is not in any sense a proprietary matter. I can see merit, if not convincing force, in the proposition, that a city when it enters into a contract for a public utility, even though municipal control of rates be thereby abridged or abandoned, acts in a proprietary character, but this proposition by no means takes away from the power thus abandoned its governmental or legislative character. This distinction seems to be presented in the following quotation:

"The power to fix and to regulate the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation, and other public utilities partakes of the nature of a governmental power and also of that of a business power. Are the inhabitants of a city paying rates not fixed by contract to quasi public corporations for public utilities? The power to so regulate these rates that they shall not be unreasonable is a legislative, a governmental power which the state or city may exercise, but may not renounce. Is a city without waterworks and hence without rates at which anyone will furnish water therefrom to the municipality or its inhabitants? The making of a contract for the construction and operation of water works wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years is the exercise of one of the business powers of the corporation. The purpose of such a contract is not to regulate rates, for there are no rates to regulate. Hence it is that the Legislature of a state, unless prohibited by its Constitution, may empower a city to suspend by contract, and a city may suspend in that way during

a reasonable term of years, its power to change or regulate the rates which an individual or corporation may collect of private consumers." (Omaha Water Co. *vs.* Omaha, 147 Fed. 1-5.)

95 In a leading case on this subject it is said:

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe *vs.* R. & B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maximum *sic utero tuo ut alienum non laedas.* From this source come the police powers, which, as said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty * * * that is to say * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold.

To this day statutes are to be found in many of the States upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within any

96 of the constitutional prohibitions against interference with private property." (Munn *vs.* Illinois, 94 U. S. 124.)

In another case a specific designation is made as follows:

"This power of regulation is a power of government continuing in its nature and if it can be bargained away at all it can only be by words of positive grant or something which is in law equivalent." (Railroad Commission Cases, 116 U. S. 325.)

In yet another case it is held, quoting from the syllabus:

"An Act of the legislature of New York (Laws of 1888, chap. 581) provided that the maximum charge for elevating, weighing and discharging grain should not exceed five-eighths of one cent a bushel; and that, in the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal boats, should only be required to pay the actual cost of trimming or shovelling to the leg of the elevator when unloading, and trimming cargo when loading; held, that the act was a legitimate exercise of the police power of the State over a business affected with a public interest, and did not violate the Constitution

of the United States and was valid." (Budd *vs.* New York, 143 U. S. 517.)

At page 534 of the same case, appears the following:

"The opinion further said that the criticism to which the case of Munn *vs.* Illinois had been subjected proceeded mainly upon a limited and strict construction and definition of the police power; that there was little reason, under our system of government, for placing a close and narrow interpretation on the police power, or restricting its scope so as to hamper the legislative power, in dealing with the varying necessities of society and the *and the* new circumstances as they arise calling for legislative intervention in the public interest; and that no serious invasion of constitutional guarantees by the legislature could withstand for a long time the searching influence of public opinion, which was sure to come sooner or
97 later to the side of law, order and justice, however it might have been swayed for a time by passion prejudice, or whatever aberrations might have marked its course.

"We regard these views which we have referred to as announced by the Court of Appeals of New York, so far as they support the validity of the statute in question, as sound and just."

In a still later case, the Supreme Court, referring to the matter of rates, said:

"These acts are urged to establish the power in the village of Rogers Park to grant to the plaintiff in error the right to charge and collect for thirty years the rates prescribed by the ordinance of November, 1888. * * * A strict construction must be exercised. The contract claimed concerned governmental functions, and such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions." (Rogers Park Water Co. *vs.* Fergus, 180 U. S. 624-629.)

From the foregoing excerpts, it is manifest, that the Supreme Court classifies the power to regulate rates as governmental and falling within the police powers of the State.

Nor does Los Angeles City Water Co. *vs.* Los Angeles, 88 Fed. 721, hold anything to the contrary, but after quoting from a line of decisions which treat the power in question as proprietary, the court there says:

"If, however, it be conceded, contrary to these authorities, and as claimed by defendants, that the power of the city to regulate water rates is legislative or governmental, the city may by contract abridge such power under an implied as well as an express legislative grant and this rule is recognized in many of the authorities upon which defendant relies."

In the Los Angeles case there was no dispute but that the city had entered into a contract which limited its power to regulate rates, and the court held, that, conceding this power to be legislative, still it was competent for the city to bargain it away.

98 Plaintiff's syllogism, substantially as follows: Police power cannot be bartered away: power to regulate rates may be surrendered by contract: therefore, power to regulate rates is not a police power; is manifestly unsound in its first premise. It has been au-

thoritatively and repeatedly held, that powers of sovereignty contractually abandoned. In the earliest case on this subj clearly implied, that even the sovereign power of taxation thus surrendered, the court saying "That the taxing power is importance; that it is essential to the existence of the gove are truths which it cannot be necessary to reaffirm. They knowledged and asserted by all. It would seem, that the rel ment of such a power is never to be presumed. We will not a state may not relinquish it; that a consideration sufficient able to induce a partial release of it, may not exist: but as th community is interested in retaining it undimi-shed; th munity has a right to insist, that its abandonment ought n presumed, in a case in which the deliberate purpose of the abandon it does not appear." (Providence Bank *vs.* Bill U. S. 514-560.)

So, too, the police power of the State may be surrend abridged by contract, if the contract be not prejudicial to th good order, health or morals of its inhabitants. This qual is stated by a case cited by plaintiff as follows:

"The argument that the contract is void as an attempt t away the legislative power of the city council rests upon the tion that contracts for supplying a city with water are wi police power of the city, and may be controlled, managed or a at the pleasure of the council. This court has doubtless h the police power is one which remains constantly under the of the legislative authority, and that a city council can 99 bind itself, nor its successors, to contracts prejudicia peace, good order, health or morals of its inhabitant is to cases of this class that these rulings have been ec (Walla Walla *vs.* Walla Walla Water Co., 172 U. S. 1-15.)

The police powers, however, include other subjects than th merated, and, as said in Munn *vs.* Illinois, *supra*, "Und powers the government regulates the conduct of its citizens wards another, and the manner in which each shall use property, when such regulation becomes necessary for th good. In their exercise it has been customary in England fr immemorial, and in this country from its first colonization ulate ferries, common carriers, hackmen, bakers, millers wha innkeepers, &c., and in so doing to fix a maximum char made for services rendered, accommodations furnished, and sold."

The Walla Walla case above referred to, so far from that regulation of rates is not a police power, holds, that, contract is itself innocuous, it may be sustained, even th abridges the police power. Thus, at page 16, the court says:

"Under this power and the analogous power of taxation w have no doubt that the city council might take such mea were necessary or prudent to secure the purity of the wa nished under the contract of the company, the payment of contributions to the public burdens, and the observance of ordinances respecting the manner in which the pipes and

the company should be laid through the streets of the city. New York *v.* Squire, 145 U. S. 175; St. Louis *v.* Western Union Tel. Co., 148 U. S. 92; Laclede Gas Light Co. *v.* Murphy, 170 U. S. 78. But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

100 The same distinction is recognized in another quotation at page 24 of plaintiff's brief, as follows:

"I may add that a law for the purpose of securing and enforcing fair and reasonable charges by common carriers is not to be classed with those laws making for the public health and public morals, the power to enact which cannot be contracted away or parted with by the state." (Central Trust Co. *vs.* Citizens Street Ry. Co., 82 Fed. 1-8.)

I am clearly of opinion, both upon reason and authority, that control of rates is distinctively a police power of the State; indeed the decisions of the Supreme Court are conclusive of the question.

Such being the character of the power, the rule of construction applicable to cases where parties claim its abandonment or suspension is easily ascertained. The Supreme Court has said:

"This power of regulation is a power of government continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in the case of Providence Bank *vs.* Billings, 4 Pet. 514-561, 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been considered and applied are numerous." (Stone *vs.* Farmers' Loan and T. Co., 116 U. S. 307.)

Again, it has been said:

"Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and, unless an exemption is clearly established, the legislature is free to act on all subjects within its general jurisdiction, as the public interests may seem to require. As was said by Chief Justice Taney, speaking for the court, in Charles River Bridge *vs.* Warren Bridge, 11 Pet. 547: 'It can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created.' This is an elementary principle." (Ruggles *vs.* Illinois, 108 U. S. 526.)

See also Freeport Water Co. *vs.* Freeport, 180 U. S. 587; Danville Water Co. *vs.* Danville, 180 U. S. 619; Rogers Park Water Co. *vs.* Fergus, 180 U. S. 624; Atlantic & Pacific R. R. Co. *vs.* U. S., 76 Fed. 186.)

101 Bearing in mind the rule of construction applicable to contracts which are claimed to abandon or suspend governmental control of rates, let us now examine Ordinance B, granting to plaintiff's assignor its franchise. The ordinance is entitled as follows:

"An ordinance granting to M. A. King and his assigns the ri
a period of fifty years, to construct, maintain and operate c
and wires," etc., for the purpose of transmitting sound, s
conversation and intelligence by means of electricity and ca
on a general telephone business, together with certain appu
and incident rights."

The ordinance then proceeds as follows:

"Section 1. That the right, privilege and franchise is
granted to M. A. King and his assigns, to construct, lay down,
tain and operate for the period of fifty years an undergrou
duit and wires * * *

"And to transmit sound, signals, conversation and intell
through and over said wires by means of electricity, togethe
the right to construct, operate and maintain all necessary f
service wires, house connections and such other apparatus a
pliances in connection therewith as may be necessary for th
pose of safety and efficiently operating and maintaining said c
poles and wires, and carrying on a general telephone busin
means thereof * * *."

Section 9 of the ordinance provides, among other things:

"That the rent or charge for unlimited, independent, n
circuit, telephone service in the system established or mai
under said franchise so long as said system does not connect a
change with more than 10,000 telephones, shall not exceed
per annum for a telephone installed in any business office or
ises, or $30.00 per annum for a telephone installed in a priva
dence, and that when said system shall comprise mor
102 10,000 telephones, the annual rental or charge for the
said services shall not be increased by more than a sum
to $6.00 per annum for each one thousand telephones in sa
connected with said telephone system in excess of 10,000."

It is true that, by the provisions of said section of said ordi
the city of Los Angeles abandoned, for fifty years, its right to
ably limit plaintiff's charges for telephone service? Can it
that the abandonment of the power in question has been "sh
clear and unambiguous language, which will admit of no
able construction consistent with the reservation of the p
Certainly, there is no express abandonment, and the circums
of this case, particularly the long period of fifty years, forbid
plication of that sort.

I do not mean to assert, that, if a contract unequivocally
doned a legislative power for fifty years, the duration of the
donment would itself avoid the contract, but what I do say i
such a long period is a strong, if not conclusive reason w
abandonment should not be implied.

The Supreme Court of Illinois, in a case very similar to th
said.

"The village exercised the power by incorporating in the
nance a scale of prices as being just and reasonable maximum
to be paid to the company by the consumer of water. This pr
of the ordinance had no effect to establish a contract betwe

appellant company and the village that the individual inhabitants should and would pay such rates for the period of thirty years, or any fixed period of time, but was simply a declaration on the part of the village that such rates were reasonable. The legal effect was to establish, *prima facie*, the corporation, in order to discharge the duty it owed to the public, must supply the commodity it had been created to supply at the prices named in the ordinance. It was a mode of regulating and enforcing the discharge of a legal duty—not
103 a proposition looking toward a contract. No contract was necessary to create an obligation on the part of the corporation to supply water at a reasonable rate, for that rested upon it as a duty.

"Nor did the fixing of rates by the alleged ordinance of the village of Rogers Park vest in the appellant company an irrevocable right to exact such rates for the period it had been granted permission to occupy the streets, alleys and public places of the village, or for any fixed period. A rate or price reasonable and just when fixed may, in the future become so unreasonably high that the exaction of such rate or price is but an extortion. The duty of the corporation does not, however, change, but remains the same,—that is, to exact only reasonable compensation. The power of the State to enforce that duty is not exhausted by its exercise in the first or any subsequent instance but is continuous, and may be exerted from time to time, whenever necessary to prevent extortion by the agency created by the State to serve the public." (Rogers Park Water Co., *vs.* Fergus, 178 Ill. 571-578.)

Furthermore, Section 9 of ordinance B is not a grant, but a limitation. The franchise granted in the first section to construct a telephone system and carry on a general telephone business necessarily implies a right to charge reasonable rates for telephone service, (Winona, etc., Co. *vs.* Blake, 94 U. S. 180) and section 9 is but a limitation upon this right. It confers nothing, but simply qualifies what has already been conferred. It does not give any right whatever to the plaintiff, much less a right to charge up to the maximum rate, for fifty years, but is simply a legislative declaration that any charge in excess thereof would at that time be unreasonable.

This distinction and its consequences are amplified in Atlantic & Pacific R. R. Co. *vs.* United States, *supra*, and, after careful reconsideration of the opinion in that case, which was written by myself, I am satisfied with the principles it enunciates, and
104 their application to the case at bar can but lead to the conclusion, that Section 9 of Ordinance B is not, nor was it intended as a covenant surrendering the city's control of rates.

Plaintiff states its opposing contention, in general terms, thus: "A franchise which has fixed maximum rates for the services to be rendered thereunder is a contract as to the rate, and the rate cannot be reduced." I shall not undertake a full review of the cases cited by plaintiff to this contention, but will briefly notice some of them.

Stone *vs.* Yazoo & Mississippi R. R. Co., 62 Miss. 607, does not sustain the contention, as appears from the first clause of plaintiff's quotation from the case, which is as follows:

"Section 6 of the charter of the appellee confers on the company power to fix from time to time, by its board of directors, the rates at which it will transport person- or property over its railroad, provided they shall not exceed the maximum specified in the Act."

Thus it will be seen, that the right of the company to fix its rates was not an implication from the maximum rate prescribed, but was expressly conferred.

State *vs.* Laclede Gas Co., 102 Mo. 472, although somewhat different in its facts from the case at bar, seems to favor plaintiff's contention.

Pingree *vs.* Michigan Central Ry. Co., 76 N. W. 635, was also decided upon its own peculiar facts, many of which do not exist in the case at bar. The opinion is a long one, and in order to be properly understood must be carefully read. Two excerpts from the opinion, however, will clearly show, that the mere fixing of a maximum rate does not give a right to charge up to that rate, but such right can exist only where there are other expressions or circumstances in connection with the maximum rate, showing unequivocally an intent to confer such right.

105 At page 640 the court says "It was not then, a general grant of power, and therefore limited to fixing rates the reasonableness of which should be determined by the usual methods and consequently the same power as any individual or corporation would have without it, but was intended to confer a contract right to fix tolls, within the limit of three cents a mile, as plainly as though it had provided that said road should have the right to charge three cents a mile, or less, in its discretion, for transporation of passengers. It will be noticed in the cases cited that in no case where a maximum rate was fixed has the right of the company to fix toll to that amount been denied. This case is even stronger than such inasmuch as the charter expressly fixes the limitation, and unqualifiedly states that such shall be the only limitation of the company's power."

Again, at page 642 the court says: "It is noticeable that in the present case we do not 'find the section granting the power to fix rates by by-law in the same section that declares that by-laws shall not be in conflict with the laws of the state,' nor do we find a mere general authority to fix rates, nor a mere mention of a maximum rate."

It should be observed here, however, that the statement of the court in said quotation, "it will be noticed in the cases cited that in no case where a maximum rate was fixed has the right of the company to fix toll in that amount been denied," is manifestly erroneous because maximum rates were prescribed and the right of the company to fix tolls to that amount was denied in Banking Company *vs.* Smith, 128 U. S. 174.

Borough *vs.* Whitehaven W. Co., 58 Atlantic 159, so far from supporting plaintiff's contention, treats the maximum rate prescribed as a limitation upon, not the grant of a right, and is in perfect accord with the views I have expressed.

106 Chicago R. R. Co. *vs.* Iowa, 94 U. S. 155, affords no support to plaintiff's contention. The full paragraph from which plaintiff quotes is as follows:

"This company, in the transaction of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation."

All that the court decides in this paragraph is, that, if the legislature had fixed "permanently" a maximum limit in the charter it might have been a contract against future legislative interference; indeed, the language of the court implies, that the mere fixing of a maximum limit is not a provision against future legislative control, but, that, in order to effect this result, the maximum limit must be prescribed permanently in terms.

In Detroit *vs.* Detroit R. R. Co., 60 Fed. 161, the only pertinent fact is found at page 171, as follows: "By section 8 of the ordinance of 1862, it was provided 'the rate of fare for any distance
107 shall not exceed 5 cents on any one car or on any one named in this ordinance.'" Whether this section should be construed as a grant, which was the final conclusion of the court, or a limitation, which was the court's first impression, depends largely upon other facts of the case, which do not appear, and I am, therefore, unable to determine its applicability or force here.

City of Indianapolis *vs.* Central Trust Co. of New York, 83 Fed. 529, simply decides, that the plaintiff in good faith claimed a vested contract right to charge a higher rate of fare than that fixed in the ordinance assailed, and, that, therefore, the court had jurisdiction of the case.

Moreover, it is to be inferred from the statement of facts, that the ordinance fixing the maximum was passed pursuant to a statute of the state which gave power to the street railway company "to make by-laws among other things for regulating the running of the cars and the rate of fares on the road." If this inference be correct, then it was the statute which gave the power to the company to fix the rates, while the ordinance which prescribed the maximum was but a limition on that power.

Detroit *vs.* Detroit Cit. Ry. Co., 184 U. S. 368, is widely and

readily distinguishable from the case at bar. The court there that the rate provisions gave the company a contractual ri charge up to the maximum, on the ground, that the ordinan passed under and pursuant to an act of the legislature whi pressly directed the parties, that is, the city and the street r company, to fix rates by agreement.

The opinion of the court shows, that the meaning it gave language fixing maximum rates was demanded by the peculi cumstances of the case, and, that the same language, under circumstances, would call for a different construction. This id

court emphasies as follows:

108 "It may very well be that language used by a legi in merely conferring authority upon a company to fix charges for fare might not be regarded as amounting to a co when the same language used by parties in fixing rates under lative authority and direction to agree upon them would be re as forming a contract, because the statute provided special that mode of determining them."

The Supreme Court, in a later case, where the provision maximum rate was, that "Said company will supply privat sumers with water at a rate not to exceed 5 cents per 100 ga said:

"The trouble at the bottom of the company's case is that th posed promise of the city on which it is founded does not exi such a promise had been intended it was far too important to to implication. In form the words of this part of the instr are the words of the company alone. They occur in the part contract which sets forth company's undertakings, not in th devoted to the promises of the city or in that which contains t later mutual agreements. See Georgia Railroad & Banking Smith, 128 U. S. 174; Regan *vs.* Aiken, 9 Lea, 609. They are of a company which was notified by the act which called it into of the power expressly conferred upon the city 'by ordina regulate the price of water' which the company might supply. ple who have accepted, as experience shows that people will a charter subject to such liabilities cannot complain of th repudiate them, nor can the company which they have fo Rockport Water Co. *vs.* Rockport, 161 Massachusetts, 279. Th sideration answers a portion of the company's argument as rights under the Fourteenth Amendment, and makes it u sary to consider whether the regulation of water rates is prop be classed as a police power. It also reinforces our interpreta

the instrument upon which the company founds its cl

109 "We do not mean that under other circumstances which on their face only express a limit might not e a contract more extensive than their literal meaning. Det Detroit Citizens' Street Ry. Co., 184 U. S. 368. But in th the rate was fixed by an ordinance which was the language city, the ordinance was under a statute which declared that th should be established by agreement between the city and the r company, and neither statute nor ordinance reserved a po

the city to alter rates. In the present case it seems to us impossible to suppose that any power to contract which the city may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law under which the water company was created. It would require stronger words than those used here to raise the question whether, under the statutes in force, the city could do it if it tried. The contracts fixing prices authorized by the statute were contracts between the company and its consumers, not, as in the case of the railway company, a single contract between the company and the city, and were subject to the power to regulate them given to the city by the same statute. We assume that the charter of the city authorized it to contract, but it was not so specific as the statute which we have quoted, and added nothing to the power conferred by that law." (Knoxville Water Co. *vs.* Knoxville, 189 U. S. 434-436.)

Not only does this last quotation confirm the views which I have expressed of the Detroit case, but distinguishes it from Georgia Banking Company *vs.* Smith, 128 U. S. 174, which holds, in substance, that the mere fixing of a maximum rate is not a surrender of the power of future regulation. The rate provision in the latter case was as follows: "Provided, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot on articles of measure-
110 ment, for every one hundred miles; and five cents per mile for every passenger," and the court said:

"The question then arises whether there is in the 12th section of the charter of the plaintiff in error a contract that it may make any charges within the limits there designated.

* * * * * * *

"It does not matter in the present case, whether the term be construed as imposing a condition on the preceding exclusive grant to the company of the privilege of transporting passengers and merchandise over its own roads, or be considered merely as a conjunction to an independent paragraph, declaring a limitation upon the charges which the company may make. If considered as a condition to the enjoyment of the exclusive right designated, then the section only provides that, so long as the maximum of rates specified is not exceeded, the company or its lessee shall have the exclusive right to carry passengers and merchandise over its roads. It contains no stipulation, nor is any implied, as to any future action of the legislature. If the exclusive right remain undisturbed, there can be no just ground of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the legislature had, in 1883, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated.

"It is conceded that a railroad corporation is a private corporation, though its uses are public, and that a contract embodied in terms of

its provisions, or necessarily implied by them, is within the co
tutional clause prohibiting legislation impairing the obligation
contracts. If the charter in this way provides that the charges, w
the company may make for its services in the transporta
111 of persons and property, shall be subject only to its own
trol up to the limit designated, exception from legislativ
terference within that limit will be maintained. But to effect
result, the exemption must appear by such clear and unmistak
language that it cannot be reasonably construed consistently
the reservation of the power by the State. There is no such lang
in the present case. The contention of the plaintiff in error th
fore fails, and the judgment must be affirmed."

Cleveland *vs.* Cleveland Street Ry. Co., 194 U. S. 517, ca
justly be considered a precedent here, since most of the facts
which the decision turned are absent from the case at bar.
instance, the court there said:

"It is undoubtedly true that, immediately before and for a
time prior to the passage of the ordinances concerning the va
consolidations and extensions referred to, the respective roads affe
thereby were charging a cash fare of five cents over their respe
lines, and that the effect of the consolidations and extensions wa
secure to the public the benefit of a cash fare of five cents over
whole length of the consolidated and extended lines."

Again, the court says:

"The statutes show that there was lodged by the legislatur
Ohio in the municipal council of Cleveland comprehensive po
to contract with street railway companies in respect to the terms
conditions upon which such roads might be constructed, opera
extended and consolidated, the only limitation upon the po
being that in case of an extension or consolidation no increase in
rate of fare should be allowed."

In the case at bar, the power to contract, if it exists at all, is
an implied power, and cannot justly be called a "comprehen
power," such as that described in the above quotation.

112 In the Cleveland case, it was specifically provided: "
for a single fare from any point to any point on the lin
branches of the consolidated road no greater charge than five c
shall be collected, and that tickets at the rate of eleven for fifty c
or twenty-two for one dollar shall at all times be kept for sale on
cars by conductors."

The clause "and that tickets at the rate of eleven for fifty cen
twenty-two for one dollar shall at all times be kept for sale on
cars by conductors," aids somewhat in giving to the rate provi
a contractural character, the words "at all times," signifying the
of the franchise, twenty-five years.

Again, in the Cleveland case, the court further says: "The
ceptance of this ordinance by the railroad companies affected the
was required to be in writing and filed with the city."

Again, the court, in that case, said:

"Like provisions were contained in the ordinance of Apri
1887, authorizing the laying of an additional track and the ex

sion of the lines of the Woodland Avenue and West Side Street Railroad Company, and there was also a declaration, following the authorization of the extension and the rates to be charged on the whole line, that 'The right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908.' The ordinance of August 12, 1887, authorizing a further extension, and the ordinance of June 20, 1892, authorizing the double tracking of a portion of the line, contained similar language."

The clause "and there was also a declaration, following the authorization of the extension and the rates to be charged on the whole line, that 'The right herein granted shall terminate with
113 the present grant of the main line, to wit, on the 10th day of February, 1908,'" was evidently a circumstance of much weight in the mind of the court, since "the right" which was to terminate on the 10th day of February, 1908, related both to "the authorization of the extension and the rates to be charged on the whole line," that is to say, "the right" granted included the matter of rates as well as the extension of the road. Furthermore, this right was to terminate in a specific time, 25 years, or, differently expressed, was to continue for that period.

None of the foregoing circumstances are found in the case at bar, and not only are they made prominent by the court in stating the material facts of the Cleveland case, but the court, in its summary, presumably to the end, that there might be no mistake or doubt as to the grounds of its decision, and, that it might not thereafter be improperly invoked as a precedent, emphasizes said facts as among the controlling circumstances of the case, in the following unequivocal language:

"In reason, the conclusion that contracts were engendered, would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter, that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged. Taking all the circumstances above referred to into account, the case before us clearly falls
114 within the rule as to the binding character of agreements respecting rates applied in Detroit *v.* Detroit Citizens' Street Railway Company, 184 U. S. 368, and approvingly referred to in Knoxville Water Co. *v.* Knoxville, 189 U. S. 434, 437."

The court looked not merely to one or two of said facts, but was careful to say "Taking all the circumstances above referred to into account, the case before us clearly falls within the rule as to the bind-

ing character of agreements respecting rates applied in De
Detroit Citizens' Street Railway Company, 184 U. S. 368, a
provingly referred to in Knoxville Water Co. *v.* Knoxville, 18
434, 437,"

Another difference of great importance between the Clevela
and the one at bar, is, that, in the Cleveland case, the sus
of the power of regulation was for only 25 years. In the case
the suspension, if held to exist, would be for the period of 5
Indeed, this distinction applies to all of the cases cited in th
nection except the Freeport case, where the existence of a
for rates was denied, and it is worthy of note, that plaintiff
brief, states, that the period of suspension in the Freeport
years, was an unreasonable time.

It is also worthy of notice, that, in the Cleveland case, th
refers approvingly to the Knoxville case, wherein, as I have
shown, it was held, that the mere fixing of maximum rates
displace the municipal power of regulation given by the gene
under which the water company was created.

Furthermore, there is no provision in Section 9 of ordin
as to when the maximum rates there prescribed shall termi
how long they shall last. This becomes more noticeable w
read in the same connection the first clause of Section 11 o
nance B, "that the person to whom this franchise is granted
assigns, shall, during the life of said franchise pay to the city
Angeles in lawful money of the United States two p
115 of the gross annual receipts of such grantee and his
arising from the use, operation or possession of sai
chise."

Thus, it will be seen, that section 11 expressly provides, t
per cent. of the gross annual receipts of the company shall
to the city "during the life of said franchise," whereas the pr
of section 9 as to rates are not fixed, as they were in the Cl
case, for a stated time.

It is true, that the city by ordinance B required plaintiff
nish for the use of the city 30 telephones and 150 pairs of co
and to pay to the city two per cent. of its gross annual recei
these things were doubtless considered an adequate considera
the franchise granted plaintiff to use the public streets an
for the construction and operation of plaintiff's telephone
but I find no case which supports plaintiff's contention, th
a consideration alone is sufficient to show, that the city,
granting the use of the public streets and alleys, intended
contract as to rates, thus abandoning its control of plaintiff's
for the unusual period of half a century.

A somewhat elaborate review of the cases, including thos
cited, bearing upon the point now under consideration, ha
made by the Circuit Court of Appeals of the Eighth Circu
case wherein the court, on grounds substantially the same
the case of Detroit *vs.* Detroit Citizens' Ry. Co., *supra*, hel
there was a suspension of the power to regulate rates. (
Water Co. *vs.* Omaha, 147 Fed. 1.)

After much reflection upon the subj-ct, and a careful review of the authorities, I can but conclude, that the city of Los Angeles did not, by ordinance B, abandon or suspend its power to regulate charges for telephone service.

III. My ruling, just announced, that there was no contract as to rates between the city and the plaintiff, disposes of the
116 latter's contention, that ordinance D violates what is known as the impairment clause of the Constitution.

Plaintiff's kindred contention, that said ordinance violates the Fourteenth Amendment, seems to be rested on the ground, that "equal protection of the laws," within the meaning of said amendment, so far as rates are concerned, is afforded only where the rates are fixed uniformly throughout the State by general laws, and, on the further ground, that ordinances D and E, which prescribe different rates for two companies, operating in said city, unlawfully discriminate against plaintiff, and, that, since ordinance D makes no provision for notice, it would, if executed, deprive plaintiff of property without due process of law.

The first of these grounds has already been considered, the others will now receive attention.

A moment's reflection shows, that the mere fact, that different rates are prescribed for two companies, does not, of itself, establish unlawful discrimination against either. Such discrimination can result from different rates only where the companies are identical as to those factors which determine just compensation, among them being value of plant, revenues and expenditures. (San Diego Water Co. *vs.* San Diego, 118 Cal. 556.) These conditions are rarely, if ever, the same in any two companies, and it is obvious, that a rate fair to one company might be very unfair to another. To obtain relief on said ground, it is not sufficient to allege discrimination in general terms, but the facts out of which the discrimination grows must be clearly and specifically shown.

Moreover, ordinance C, whose validity I have already shown, was intended to place before the city council such information as would enable it to do full justice to the plaintiff in the matter of rates. In paragraph XIV of the bill of complaint, it is expressly alleged, that plaintiff has not complied and declines to comply with
117 said ordinance. Thus it appears, that plaintiff has intentionally refused to do that which the law expressly enjoins, namely, furnish the information required by said ordinance, and for the lack of which the unlawful discrimination, if any, presumably resulted.

Plaintiff will not be heard to complain in equity of a condition of things brought about by its own willful omission of duty.

It should be remembered, in this connection, that the reasonableness or unreasonableness of the rates fixed by ordinance D is not before the court, but the only question is whether or not the city had power to fix any rate. In order to raise the question of reasonableness, it would be incumbent upon the plaintiff to allege, as I have already indicated, the particular facts on which the claim of unreasonableness rests. (Covington, etc., Turnpike Co. *vs.* Sanford, 164

U. S. 578; Atlantic & Pacific R. R. Co. *vs.* U. S., 76 Fed. 186; 1
lands, etc., Water Co. *vs.* Redlands, 131 Cal. 365; San Diego W
Co. *vs.* San Diego, 118 Cal. 556.)

As stated above, however, plaintiff's contention is not, that
rates fixed by the city in ordinance D are so low as to be oppres
but that the maximum rate fixed in ordinance B is unalterable
a period of fifty years.

The other ground on which plaintiff bases its claim of an in
tion of the Fourteenth Amendment, namely, that the ordinanc
does not provide for notice, is equally untenable.

Said ordinance, being, as I have already held, legislative in c
acter, no notice of intention to pass or consider it was requ
(Moore *vs.* Haddonfield, 62 N. J. Law 386; Cleveland, C. C. &
L. R. R. Co. *vs.* St. Bernard, 19 Ohio Circuit Court Rep. 299.)

On this subject of notice, the Supreme Court of California
said:

"Whether the fixing of rates by the council be call
118 legislative, a judicial, or an administrative act, it is certa
not an adversary judicial proceeding, such as, under the
stitution, will conclude private rights. It is a proceeding on the
of the government to which neither the water company nor the
payers are parties, conducted without notice to them, and wit
any right on their part to effectually intervene." (San Diego W
Co. *vs.* San Diego, 118 Cal. 315.)

To the same effect is the case of Water Works *vs.* San Franc
82 Cal. 286-315.

The Supreme Court of the United States has also declared n
unnecessary, in the following language:

"Was the appellant entitled to formal notice as to the precise
upon which the water rates would be fixed by ordinance? We t
not. The constitution itself was notice of the fact that ordinanc
resolutions fixing rates would be passed annually in the mont
February in each year and would take effect on the first day of
thereafter. It was made by statute the duty of the appellee at
thirty days prior to the 15th day of January in each year to ob
from the appellant a detailed statement, showing the names of
rate payers, the amount paid by each during the preceding year,
'all revenues derived from all sources,' and the 'expenditures
for supplying water during said time.' It was the right and du
appellant in January of each year to make a detailed state
under oath, showing every fact necessary to a proper conclusion
the rates that should be allowed by ordinance. Act of Marc
1881, § 2 above cited. Provision was thus made for a hearin
an appropriate way. The defendant's board could not have re
to have duly considered it and given it proper weight in determi
rates. If the State by its constitution or laws had forbidden the
or its board to receive and consider any statement or sho
119 made by the appellant touching the subject of rates, a d
em question would have arisen. But no such case is
presented. In Kentucky Railroad Tax Cases, 115 U. S. 321,
it was said: 'This return made by the corporation through its off

is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert. It is laid by the auditor of public accounts before the board of railroad commissioners, and constitutes the matter on which they are to act. They are required to meet for that purpose on the first day of September of each year at the office of the auditor at the seat of government. * * * These meetings are public and not secret. The time and place for holding them are fixed by law.' (San Diego Land Co. *vs.* National City, 174 U. S. 739-752.)

A like ruling, based expressly upon this San Diego case, was subsequently made in Freeport Water Company *vs.* Freeport, 180 U. S. 587-600.

It should be remembered in this connection, that ordinance C provides, that rates shall be fixed at a regular or special meeting of the city council, held during the month of February of each year, and makes it the duty of every person, firm or corporation supplying telephone service to said city or its inhabitants to furnish to the city council in the month of January of each year written statements under oath of receipts revenues and expenditures during the year preceding the date of such statement, and also an inventory of all the works, lines, plant and property owned or used by such person, firm or corporation, necessary or convenient to carrying on its business, and showing the actual cost and present cash value of each item thereof.

These provisions of said ordinance are substantially the same as the provisions of the constitution and statute referred to in the quotation last above made, and bring the case at bar within the principles there enunciated.

120 The last three decisions, one by the Supreme Court of California and the other two by the Supreme Court of the United States, are determinative of the question of notice and it is unnecessary to review in detail the numerous cases from other States referred to in plaintiff's brief.

The California cases cited at page 13 of said brief, and that of Fallbrook Irrigation District *vs.* Bradley, 164 U. S. 168, as well as Hagar *vs.* Reclamation District, 111 U. S. 701, and other cases involving special taxes and assessments, are inapplicable here.

Chicago, etc, Ry. Co. *vs.* Minnesota, 134 U. S. 418, so far from holding that notice is necessary under the facts of the case at bar, impliedly indicates, that such notice is not required. In that case it was held, that notice was necessary largely on the ground, that the statute creating the commission made its action final and conclusive, so that the same could not in any way be reviewed by the courts. In the later case, above mentioned, San Diego Land Co. *vs.* National City, 174 U. S. 739-748, the Supreme Court said:

"Upon the point just stated we referred to the decision of this court in Chicago, Milwaukee &c. Railway *vs.* Minnesota, 134 U. S. 418, 452, 456, 457. That case involved the constitutionality of a statute of Minnesota empowering a commission to fix the rates of charges by railroad companies for the transportation of property. The Supreme

Court of the State held that it was intended by the statute
the action of the Commission final and conclusive as to rates,
the railroad companies were not at liberty, in any form o
time, to question them as being illegal or unreasonable. T
said: 'This being the construction of the statute by whic
bound in considering the present case, we are of opinion,
*construed*, it conflicts with the Constitution of the
121 States in the particulars complained of by the railr
pany.' * * * Observe that this court based its
tation of the statute of Minnesota upon the construction gi
by the Supreme Court of that State.

"What this court said about the Minnesota statute can hav
plication to the present case unless it be made to appear that
stitution and laws of California invest the municipal auth
that State with power to fix water rates arbitrarily, without
gation, and without permitting the corporations or persons
thereby to make any showing as to rates to be exacted or to
at any time or in any way upon the subject. The contenti
pellant is that such is the purpose and necessary effect of
stitution of the State. We are not at liberty so to interpret
strument." (San Diego Land Co. *vs.* National City, 174 U
748.)

In the case at bar, as held in San Diego Water Co. *vs.* Sa
*supra*, and San Diego Land Co. *vs.* National City, *supra*, t
of the city council in fixing telephone rates is not final o
sive, but open to judicial examination as to whether or not
so fixed are reasonable.

This last case is fully in point, and holds, upon facts subs
similar to those in the case at bar, that notice is unnecessa

The ruling made by me as to the power of the city over t
rates and the construction of Section 9 of ordinance B su
answer plaintiff's contention, as to an estoppel.

My conclusions upon the whole case may be summarize
lows: The charter of the city of Los Angeles, at the time of
sage of the ordinances sought to be annulled, conferred u
c y power to regulate charges for telephone service, and sa
,as not surrendered or abridged by the grant of plaintiff's f
or otherwise, nor do said ordinances, or either of th
122 travene any of the provisions of the Constitution of th
States.

The demurrer to the bill is accordingly sustained.

OLIN WELLBORN, .

Counsel for complainant states that the Court, in its Op
using the following words, on Page 41, in lines 8, 9 and
'that plaintiff, in its brief, states, that the period of suspensi
Freeport case, 55 years, was an unreasonable time,' placed u
plainant's statement in the brief, a meaning not intended,
what was meant to be said was that the Court in the Free
held that 55 years was an unreasonable time.

The foregoing Note is made by Order of Court August 5

WM. M. VAN DYKE,

(Endorsed:) No. 1243. U. S. Circuit Court, Southern District of California, Southern Division. The Home Telephone & Telegraph Co. *vs.* The City of Los Angeles, *et al.* Opinion of the Court on Demurrer to the Bill. Filed Jul- 8 1907 Wm. M. Van Dyke Clerk.

123 In the Circuit Court of the United States, Southern District of California, Southern Division.

HOME TELEPHONE AND TELEGRAPH COMPANY, a Corporation Complainant,

*vs.*

THE CITY OF LOS ANGELES, a Municipal Corporation; A. C. HARPER, as Mayor Thereof; and R. W. DROMGOLD, EDWARD A. CLAMPITT, WALTER J. WREN, NILES PEASE, A. J. WALLACE, HENRY H. YONKIN, HENRY LYON, BERNARD HEALY and EVERETT L. BLANCHARD, as Members of the Common Council Thereof, Defendants.

*Petition for Appeal to the Supreme Court of the United States.*

The above named complainant, conceiving itself aggrieved by the decree made and entered on the 5th day of August, 1907, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and for the reason that the case involves the construction or application of the Constitution of the United States and it is a case in which the law of the State of California is claimed to be in contravention of the Constitution of the United States, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

A. B. McCUTCHEN,
OSCAR A. TRIPPET,
*Attorneys for Complainant.*

J. S. CHAPMAN,
*Of Counsel for Complainant.*

Dated this 5th day of August, 1907.

124 (Endorsed:) No. 1243 Dept. In the Circuit Court of the United States, Southern District of California, Southern Division. Home Telephone and Telegraph Co., Complainant, *vs.* The City of Los Angeles, *et al.*, Defendants Petition for Appeal to the Supreme Court of the United States. Filed Aug. 5 1907 Wm. M. Van Dyke Clerk A. B. McCutchen Oscar A. Trippet 315 Coulter B'ld'g Los Angeles, Cal., Attorneys for Complainant.

125 In the Circuit Court of the United States, Southern
of California, Southern Division.

HOME TELEPHONE AND TELEGRAPH COMPANY, a Corporatio
plainant,

*vs.*

THE CITY OF LOS ANGELES, a Municipal Corporation; A. C.
as Mayor Thereof; and R. W. DROMGOLD, EDWARD A. CL
WALTER J. WREN, NILES PEASE, A. J. WALLACE, HE
YONKIN, HENRY LYON, BERNARD HEALY and EVE
BLANCHARD, as Members of the Common Council Ther
fendants.

*Assignment of Errors.*

Now comes the complainant and says that in the record a
ceedings of the said court in the above entitled cause and
final decree made and entered therein on the 5th day of
1907, there is manifest error, and for error the said com
assigns the following.

I.

The court erred in that it did not hold that the Amended a
plemental Bill of Complaint stated a good cause of action t
the defendants should be required to file their answers or pl

II.

The court erred in sustaining the demurrer of the defenda
each of them, and directing that the amended and suppl
bill of complaint be dismissed.

III.

126 The court erred in dismissing the amended and
mental bill of complaint, and in holding that it did
title the complainant to any relief.

IV.

The court erred in holding that the laws of the State of C
did, at the time of the passage of the ordinance attached to
as Exhibits "C" and "D," confer upon the City of Los Angel
to regulate charges for telephone service.

V.

The court erred in holding that ordinance No. 6959, be
hibit "B" to the amended and supplemental bill of compla
not constitute a contract fixing and determining the rat
charged by the holder of said franchise.

VI.

The court erred in holding that Exhibits "C" and "D,"
to the said amended and supplemental bill of complaint,

contravene that clause of Section X, Article I of the Constitution of the United States which forbids any state to pass a law impairing the obligation of contracts, or those provisions of the Fourteenth Amendment to said constitution which forbid a state to deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

VII.

The court erred in not deciding that the defendants were estopped to deny that Exhibit "B" attached to said amended and supplemental bill of complaint constituted a contract between the complainant and the City of Los Angeles, as to all of its parts and features.

VIII.

The court erred in not granting the prayer of the bill, the same having been confessed by demurrer thereto to be true.

127

IX.

The court erred in deciding that the amended and supplemental bill of complaint is vague and uncertain as set forth in said demurrer.

X.

The court erred in deciding that the fixing of rates is an exercise of police power, and that the granting of the franchise set out in the bill of complaint fixing rates was not in execution of business of proprietary powers.

XI.

The court erred in deciding that the legislative power fixing rates is a municipal affair, and that there is constitutional and legislative grant of authority to the City of Los Angeles to legislate as to rates, and that its power in that respect is not limited to the fixing of rates by contract.

XII.

The court erred in deciding that the provisions of the city charter and the proceedings of the council, as set forth in the bill, and as shown by all the exhibits except "A" and "B" do not abridge the privileges and immunities of the complainant, and deprive the complainant of the equal protection of the laws.

XIII.

The court erred in deciding that the acts of the legislature of the State of California which provide for the sale of franchises throughout the state, do not authorize the making of a contract, as set forth in the bill of complaint fixing the rates of complainant.

XIV.

The court erred in deciding that a franchise which fixes maximum rates for service to be rendered thereunder, is not a contract as to rates, and in deciding that the rates could be reduced.

128 XV.

The court erred in deciding that the ordinance fixing the rates for the complainant is not discriminative, unjust and oppressive.

XVI.

The court erred in deciding that section 31 of the city charter of the defendant is not in violation of the constitution of the United States, and that it is not necessary to provide a method of giving notice to interested parties when the council proposes to fix rates and that it is not necessary to provide for a hearing, and that said charter does provide for due process of law.

Wherefore the complainant prays that the said decree be reversed and that the said court be directed to enter a decree in accordance with the prayer of the bill, or that the defendants and each of them be required to answer said amended and supplemental bill of complaint.

A. B. McCUTCHEN,
OSCAR A. TRIPPET,
*Solicitors for Complainant.*

J. S. CHAPMAN.
*Of Counsel for Complainant.*

(Endorsed:) No. 1243. Dept. In the Circuit Court of the United States, Southern District of California, Southern Division. Home Telephone and Telegraph Co., Complainant, *vs.* The City of Los Angeles, *et al.*, Defendants. Assignment of Errors. Filed Aug. 5, 1907. Wm. M. Van Dyke, Clerk. A. B. McCutchen, Oscar A. Trippet, 315 Coulter Bldg., Los Angeles, Cal., Attorneys for Complainant.

129 In the Circuit Court of the United States, Southern District of California, Southern Division.

HOME TELEPHONE AND TELEGRAPH COMPANY, a Corporation,
Complainant,
*vs.*
THE CITY OF LOS ANGELES, a Municipal Corporation; A. C. HARPER as Mayor Thereof; and R. W. DROMGOLD, EDWARD A. CLAMPITT, WALTER J. WREN, NILES PEASE, A. J. WALLACE, HENRY H. YONKIN, HENRY LYON, BERNARD HEALY and EVERETT L. BLANCHARD, as Members of the Common Council Thereof, Defendants.

*Order Granting an Appeal.*

Comes now the complainant by its attorneys, and come the defendants by their attorneys, and appear in open court in the above entitled cause, and said complainant files herein a petition for appeal to the Supreme Court of the United States, from the decree of this court made in said cause on the 5th day of August, 1907, dismiss

ing the amended and supplemental bill of complaint, and said complainant files herein an assignment of errors accompanying said petition for appeal, and complainant also files a bond on appeal in the sum of One Thousand Dollars, with J. S. Torrance and A. B. Cass as sureties on said bond.

It is now hereby ordered by said court, that the bond presented in support of said appeal be, and the same is hereby, approved. And it appearing to the court that this said cause, and said decree is a case that involves the application of the Constitution of the United States, and is a case in which a law of the State of California
130 is claimed to be in contravention of the Constitution of the United States; that said appeal to the Supreme Court of the United States be, and the same is hereby granted and allowed, and the Clerk is hereby ordered to certify the record in this cause to said Supreme Court.

Done in open court this 5th day of August, 1907.

OLIN WELLBORN, *Judge*.

(Endorsed:) No. 1243. Dept. In the Circuit Court of the United States, Southern District of California, Southern Division. Home Telephone and Telegraph Company, a corporation, Complainant *vs.* The City of Los Angeles, *et al.*, Defendants. Order Granting an Appeal. Filed Aug. 5, 1907. Wm. M. Van Dyke, Clerk. A. B. McCutchen, Oscar A. Trippet, 316 Tajo Building, 307 W. 1st St., Los Angeles, Cal., Attorneys for Complainant.

131 In the Circuit Court of the United States, Southern District of California, Southern Division.

HOME TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Complainant,

*vs.*

THE CITY OF LOS ANGELES, a Municipal Corporation; A. C. HARPER, as Mayor Thereof; and R. W. DROMGOLD, EDWARD A. CLAMPITT, WALTER J. WREN, NILES PEASE, A. J. WALLACE, HENRY H. YONKIN, HENRY LYON, BERNARD HEALY and EVERETT L. BLANCHARD, as Members of the Common Council Thereof, Defendants.

*Bond on Appeal.*

Know all men by these presents:

That we, Home Telephone and Telegraph Company, as principal, and A. B. Cass and J. S. Torrance, as sureties, are held and firmly bound unto the City of Los Angeles, and to each of the defendants above named, in the full and just sum of One Thousand Dollars ($1000.), to be paid to said defendants, The City of Los Angeles, a municipal corporation; A. C. Harper, as Mayor thereof, and R. W. Dromgold, Edward A. Clampitt, Walter J. Wren, Niles Pease, A. J. Wallace, Henry H. Yonkin, Henry Lyon, Bernard Healy and Everett L. Blanchard, as members of the Common Council thereof,

their certain attorneys, executors, administrators or assigns, for v
payment, well and truly to be made, we bind ourselves, our
executors and administrators, jointly and severally, by these pre
Sealed with our seals and dated this Fifth day of August, i
year of our Lord One Thousand Nine Hundred and Sev
132 Whereas, lately, in the Circuit Court of the United S
in and for said Southern District of California, Sou
Division, on the 5th day of August, 1907, in a suit pending i
court between the Home Telephone and Telegraph Company,
plainant, and the City of Los Angeles, *et al.*, a decree was ren
against said complainant, the Home Telephone and Telegraph
pany, and said complainant having obtained an appeal, and f
copy thereof in the clerk's office of the said court to reverse th
cree in the aforesaid suit, which appeal was allowed in open
during the term at which said decree was rendered, and the de
ants appearing at the time of granting said appeal:

Now, the condition of the above obligation is such that if the
Home Telephone and Telegraph Company shall prosecute its a
to effect, and answer all damages and costs if said complainan
to make its appeal good, then the above obligation to be void,
wise to remain in full force and virtue.

HOME TELEPHONE AND TELEGRA
COMPANY.

[SEAL.] By A. B. CASS, *President.*
J. S. TORRANCE, *Secretary.*
A. B. CASS. [SEA
J. S. TORRANCE. [SEA

Sealed and Delivered in the Presence of
E. W. MURPHY.
F. W. REA.

(Endorsed:) No. 1243. Dept. In the Circuit Court of the U
States, Southern District of California, Southern Division.
Telephone and Telegraph Co., Complainant, *vs.* The City o
Angeles *et al.*, Defendants. Bond on appeal. Filed Aug. 5,
Wm. M. Van Dyke, Clerk. A. B. McCutchen, Oscar A. Trippe
Coulter Bldg., Los Angeles, Cal., Attorneys for Complainant.

133 In the Circuit Court of the United States of America, of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

No. 1243.

HOME TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Complainant,

*vs.*

THE CITY OF LOS ANGELES, a Municipal Corporation; A. C. HARPER, as Mayor Thereof; and R. W. DROMGOLD, EDWARD A. CLAMPITT, WALTER J. WREN, NILES PEASE, A. J. WALLACE, HENRY H. YONKIN, HENRY LYON, BERNARD HEALY and EVERETT L. BLANCHARD, as Members of the Common Council Thereof, Defendants.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing one hundred and thirty-two (132) typewritten pages, numbered from 1 to 132, both inclusive, and comprised in one volume, to be a full, true and correct copy of the record, proceedings and papers upon which the decree made and entered on the Fifth day of August, 1907, in the above entitled cause was made, and of the opinion of the court, petition for appeal, order allowing appeal, assignment of errors and bond on appeal in the above and therein entitled cause, and that the same together constitute the transcript of the record on appeal to the Supreme Court of the United States in said cause.

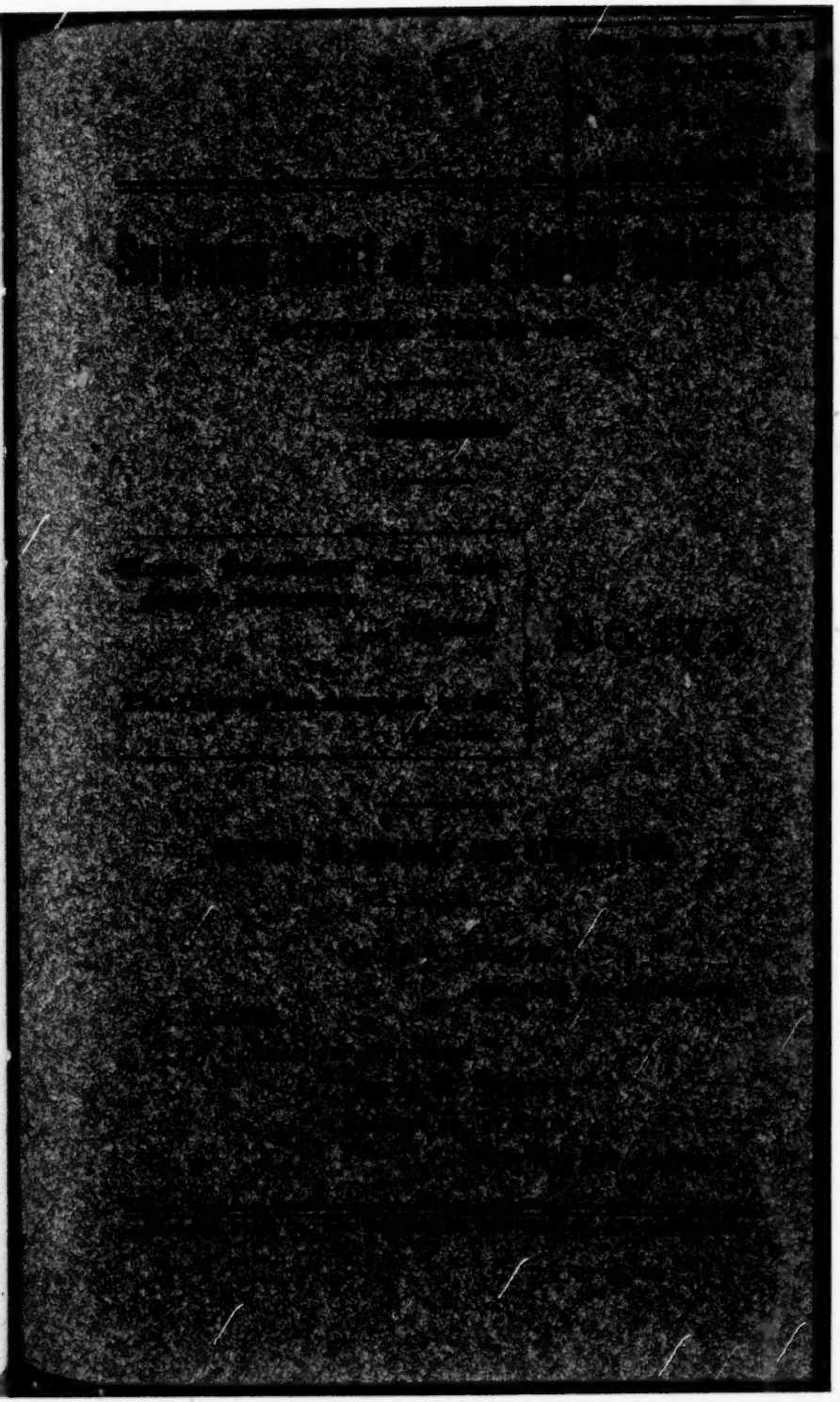
134 I do further certify that the cost of the foregoing record is $84 45 100 the amount whereof has been paid me by the Home Telephone and Telegraph Company, the Appellant in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this 21st day of August, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-second.

[Seal U. S. Circuit Court, Southern Dist. Cal., 1886.]

WM. M. VAN DYKE,
*Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.*

Endorsed on cover: File No. 20,844. S. California, C. C. U. S. Term No. 441. Home Telephone and Telegraph Company, appellant, *vs.* The City of Los Angeles, A. C. Harper, Mayor, and R. W. Dromgold *et al.*, members of the common council. Filed September 3d, 1907. File No. 20,844.



IN THE

# Supreme Court of the United States.

**OCTOBER TERM.**

**No. ~~441.~~ 173.**

**Home Telephone and Telegraph Company,**
*Appellant,*

*vs.*

**The City of Los Angeles, et al.,**
*Appellees.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

## MOTION TO ADVANCE.

Come now the parties appellant and appellees, and jointly move the Honorable Court to advance this cause on the docket and hear it as early a date as convenience of the court will permit, and for the reasons therefor, movers state:

That this cause involves the following questions:

I. Whether the telephone franchise granted by the City of Los Angeles, prescribing certain maximum rates for telephone service, and under which franchise appel-

lant company is operating a telephone business and sy
tem in said city, constitutes such a contract relative
telephone rates between said city and said company
force during the life of the franchise that the obligatio
thereof would be impaired by the fixing of such tel
phone rates by the city;

II. The power of the City of Los Angeles to fix th
telephone rates of the Home Telephone and Telegrap
Company, appellant herein, by ordinance, and otherwi
than as set forth in the franchise;

III. The validity of certain sections of the city cha
ter of the City of Los Angeles which purport to autho
ize the city council of said city to regulate telepho
service, and the use of telephones within the city, and
fix and determine the charges for telephones and tel
phone service, and connections, and particularly in thi
whether said sections do provide due process of law.

IV. The validity of a certain ordinance of the city
Los Angeles regulating the charges for telephones an
telephone service and connections, and requiring eve
person, firm or corporation supplying telephones, tel
phone service or telephone connections to the City of L
Angeles or its inhabitants to furnish to the city coun
in the month of January of each year, certain informatio
in writing, under oath, for the purpose of fixing th
rates thereof;

V. The validity of certain ordinances of the City
Los Angeles fixing telephone rates, and the right to e
force such ordinances by criminal process, or otherwis

Movers further state that the city charter of the Ci
of Los Angeles contains a provision to the effect that th

council of said city shall have power, by ordinance, to regulate telephone service, and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service and connections: that the city council of the City of Los Angeles, as the governing or legislative body of said municipality, and in accordance with the laws of the state of California, granted a certain franchise, of which appellant is now the owner and holder, to carry on a telephone business in the City of Los Angeles for the period of fifty years, and to construct, maintain and operate the necessary appliances therefor; that the ordinance granting said franchise contains among others the following provision relating to the rates for telephone service, to-wit:

"That the rent or charge for unlimited, independent, "metalic circuit, telephone service in the system estab- "lished or maintained under said franchise so long as "said system does not connect and exchange with more "than 10,000 telephones, shall not exceed $60.00 per an- "num for a telephone installed in any business office or "premises, or $30.00 per annum for a telephone in- "stalled in a private residence, and that when said system "shall comprise more than 10,000 telephones, the annual "rental or charge for the aforesaid services shall not be "increased by more than a sum equal to $6.00 per an- "num for each one thousand telephones in said city con- "nected with said telephone system in excess of 10,000."

That under the provisions of the charter of the city of Los Angeles hereinbefore referred to, the council of said city, by ordinances, fixed the telephone rates of the appellant, the Home Telephone and Telegraph Company. The said company, being dissatisfied with said ordinances, filed its bill in equity in the Circuit Court of the United

States, for the Southern District of California, which bill was afterward amended, praying that said ordinances be declared null and void, on the ground that said appellant had a franchise granted by said City of Los Angeles, and that the aforesaid provisions in said franchise relating to telephone rates constituted a contract between the City of Los Angeles and the appellant, Home Telephone and Telegraph Company, and that the adoption and enforcement of said ordinances fixing the telephone rates of said company would impair the obligation of said contract, deprive said company of its property, without due process of law, abridge the privileges and immunities of said company, and deprive it of the equal protection of the law; that in said action said company attacked the right of the said city to regulate telephone rates by virtue of the provisions of the charter of said city, and claimed that the provisions of the city charter did not afford due process of law.

That in said action appellant prayed for an injunction restraining the City of Los Angeles and its officers, appellees herein, from in any manner enforcing said ordinance requiring every person, firm or corporation supplying telephones, telephone service or connections to the City of Los Angeles or its inhabitants, to furnish to the city council in the month of January of each year certain data, for the purpose of enabling said council to fix the rates thereof; also from enforcing said ordinances prescribing the telephone rates of said appellant company. That after demurrer was filed and issue of law joined, said cause was submitted to said Circuit Court for decision thereon, whereupon said Circuit Court sus-

tained said demurrer to said amended bill. Thereupon, appellant declined to amend its bill further, and a final decree in favor of the appellees was duly made and entered therein; from which decree an appeal was taken to this Honorable Court and duly perfected.

That many complications have arisen by reason of the attempt of the City of Los Angeles to regulate rates, and other litigation besides this is threatened and imminent, involving the right of said city to fix rates for telephone and other public utility corporations, and the administration of the laws of the state of California and of the ordinances of the City of Los Angeles is involved in the litigation.

That the City of Los Angeles, by its ordinances, requires public utility corporations, and including this appellant, to file with the city in January of each year, a statement containing data for the purposes of fixing rates, and by ordinance said city purposes to fix the rates for telephones in the month of February of each year; and it is desired by the parties hereto that a decision be had of the questions involved in this case prior to the time fixed by city ordinances for the regulation of rates as aforesaid.

That by an order heretofore made this court has advanced the case of Railroad Commission of Louisiana v. Cumberland Telephone and Telegraph Company, and the same is set for hearing October 13th, 1908, and the parties hereto believe that there may be similar questions involved in the said case advanced as are involved in the Home Telephone and Telegraph Company case, No. 173. The parties hereto have stipulated, which

stipulation is hereto appended, and hereof made a part, that this cause may be advanced and set down for hearing immediately after the cause of Railroad Commission of Louisiana v. Cumberland Telephone and Telegraph Company. That printed briefs have been filed herein in accordance with said stipulation.

Movers finally show that the issues herein involve questions of great interest and pressing importance and concern to the public, and the operations of the city government of the City of Los Angeles will be embarrassed by delay so long as such questions remain undetermined by this court.

Respectfully submitted,

OSCAR A. TRIPPET,

*Attorney for Appellant.*

A. HAINES,

*Of Counsel for Appellant.*

LESLIE R. HEWITT,

*Attorney for Appellees.*

W. B. MATHEWS,

*Of Counsel for Appellees.*

IN THE

# Supreme Court of the United States.

**OCTOBER TERM.**

**No. ~~111.~~ 173.**

**Home Telephone and Telegraph Company,**
*Appellant,*
*vs.*
**The City of Los Angeles, A. C. Harper, Mayor, and R. W. Dromgold, Edward A. Clampitt, Walter J. Wren, Niles Pease, A. J. Wallace, Henry H. Yonkin, Henry Lyon, Bernard Healy, and Everett L. Blanchard, Members of the Common Council,**
*Appellees.*

## STIPULATION OF PARTIES.

It is hereby stipulated by and between the parties to the above entitled action that:

Whereas it would be to the best interest of all the parties to the above entitled cause that said appeal be heard at as early a date as possible; and

Whereas the case of The Railroad Commission of Louisiana, appellant, v. Cumberland Telephone and Telegraph Company, appellee, No. ~~457~~ 182, pending in said court, has been set down for hearing on October 13th, 1908; and

Whereas said cause No. ~~457~~ 182 may involve some of the

same questions as those to be submitted to the court in this cause, No. 173 ~~441~~, therefore, it is now hereby stipulated:

That this court be requested to advance said cause No. 173 ~~441~~, and set the same down for hearing on October 13th, 1908, at the same time when said cause No. 182 ~~457~~ is set for hearing.

It is further stipulated that the appellant in this cause will serve its brief prior to the first day of October, 1908, and file the same within five days thereafter, and that the appellees will serve their brief on or before the 7th day of October, 1908, and file the same within five days thereafter.

It is further stipulated that the parties hereto will appear in said court on October 13th, 1908, at the opening of said term, and will jointly move said court to advance this cause for hearing in pursuance of the foregoing stipulation.

OSCAR A. TRIPPET,
*Attorney for Appellant.*

A. HAINES,
*Of Counsel for Appellant.*

LESLIE R. HEWITT,
EMMET H. WILSON,
*Attorneys for Appellees.*

Dated, Los Angeles, California, July 16th, 1908.

6

Office Supreme Court, U. S.
FILED.
OCT 19 1908
JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States

OCTBER TERM, 1908.

HOME TELEPHONE AND TELEGRAPH COMPANY, *Appellant*,
*vs.*
THE CITY OF LOS ANGELES, *et al.*, *Appellees.*
No. 173.

## REPLY BRIEF FOR APPELLANT.

OSCAR A. TRIPPET,
*Solicitor for Appellant.*

A. HAINES,
*Of Counsel for Appellant.*

IN THE

# Supreme Court of the United States

OCTBER TERM, 1908.

HOME TELEPHONE AND TELEGRAPH COMPANY, *Appellant*,
*vs.*
THE CITY OF LOS ANGELES, *et al.*, *Appellees.*
No. 173.

## REPLY BRIEF FOR APPELLANT.

The apellant desires to notice briefly some of the points made for appellees in their brief on appeal.

I.

In the last paragraph of appellees' brief a suggestion is made that there is no Federal question involved, and on page 221 of the brief the following language is used:

> "It thus appears that the question of the validity of the ordinances complained of depends upon whether the charter provision (Sec. 31) purporting to authorize

the city to regulate telephone rates is valid. It is not claimed that this provision of the charter contravenes any provision of the Federal Constitution, but the contention is that it is void under the Constitution of California."

We are astonished at this statement, for we have strenuously argued that Section 31 of the charter is void because it does not afford due process of law, and we have not contended it is void as being in conflict with the Constitution of the State.

The bill shows that the Constitution of the State of California, Section 8, Article XI, authorizes a municipality to frame its own charter and adopt the same, and that Los Angeles has adopted such a charter; that said charter contains Section 31 thereof, which gives the council power by ordinance to fix and determine telephone charges; that after the adoption of this charter the legislature of the State of California adopted an act known as the Broughton Act, governing the sale of franchises by municipalities in the State; that pursuant to such act Los Angeles sold the franchise, being Exhibit "B" attached to the complaint; that said franchise contains a schedule as to rates; that appellant claims that said schedule constitutes a contract during the life of the franchise. The bill shows that the city, by the passage of certain ordinances, claims it had no power to make a contract; that it did not make such contract; that it had power to change the maximum rates specified in said franchise; that in pursuance of said Section 31 of the charter the council passed an ordinance requiring appellant to make a showing upon which the city might fix and determine the rates anew for appellant to charge. The bill shows that appellant refused to comply with said ordinance of the city on the ground that appellant had a contract with the city as to rates; that then the officers of appellant were arrested as for a misdemeanor in disobeying said ordinance;

that thereupon the council passed an ordinance fixing the rates of charge of appellant notwithstanding that appellant refused to make such showing and threatened prosecution of appellant for disobeying said rate ordinance.

The bill then avers that said ordinances impair the obligation of the contract in said franchise; that the city charter and said ordinances did not afford due process of law; that said city charter and ordinances denied the appellant the equal protection of the laws and appellant relied upon the Constitution of the United States and the provisions relative thereto which were pointed out in the bill. These allegations present fully a case of Federal cognizance.

The bill then seeks to deal with another aspect of the situation. Section 33 of Article IV of the Constitution provides that the legislature may create a commission for the purpose of regulating telegraph rates. Appellant concluded that as a matter of law the word "telegraph" in Section 33 of the constitution is the same as "telephone;" averred that the provisions of the charter are void under the constitution of the State of California and that the legislature had no right to delegate to a single municipality under such provision of the charter, right to fix rates. Taking the allegation of the bill separate from the rest of the bill, it is broad enough to be an averment, that Section 31 of the charter is void as being contrary to said Section 33 of Article IV. But taking the bill as a whole we think it is plain that appellant relied upon the Constitution of the United States in so far as the charter was adopted in pursuance of Section 8 of Article XI of the constitution.

Appellees contend here (see Appellees' Brief, para. 2, p. 109) that if Section 31 is void as being in conflict with the Constitution of the United States, still the city would have power by virtue of its general police power pursuant to Section 33, Article IV, to fix rates, and it was to this situation, undoubtedly, that the legal conclusions in the bill were directed.

Sumner v Savannah 1914 U.S. 39

We argued in the court below that if Section 31 were void as being repugnant to the Constitution of the United States, and if it were claimed that the council were a commission as provided for in Section 33, Article IV; that the legislature could not confer upon one municipality to the exclusion of the others, under said section of the constitution of the State of California, power to fix rates.

The court below considered this proposition first in the opinion and used the following language:

> "I am clearly of the opinion that the city of Los Angeles, when said ordinances were adopted, was authorized by its charter and the constitution of the State to regulate charges for telephone service, and that the authority thus conferred by the city was as ample as that possessed by the legislature; that this conclusion results, even though the grant of said authority be considered solely as a delegation from the legislature." (Tr., p. 54.)

Then the court says that the charter is entitled to a more liberal construction than if it were solely a legislative grant. That the charter is an organic law. We have adopted in the brief for appellant (see p. 67) this conclusion of the court. Appellees in their brief claim this to be the law. (Appellees' Brief, Sec. 1, p. 78, *et seq.*)

The court below concluded its discussion on this subject with the following:

> "It follows, from the foregoing views, that ordinances C and D are both valid, unless the power of regulation conferred by the local laws upon the city had been previously surrendered by contract or is in contravention of some provision of the Federal Constitution, and these two questions will be considered in the order in which they have been named." (Tr., p. 56.)

The city has placed its own interpretation upon its own

handiwork. This interpretation was undoubtedly made in good faith, and the city passed the assailed ordinances in pursuance thereof.

The court below gave the same interpretation to the charter that the city did.

The appellees in this court contend for a similar construction.

The appellant agrees with the court and appellees that Section 31 of the city charter was properly incorporated therein and in so far as the constitution of the State of California is concerned, it is not void; nor could we make the claim it was void for that reason.

These questions are therefore eliminated from the case unless this court of its own motion desires to consider them, in which event the court will find a large collection of authorities on the subject in the appellees' brief beginning at page 78.

If the allegations of the bill to which appellees refer are so ambiguous that they could be construed to mean that the city charter adopted in pursuance of Section 8, Article XI, is void as in conflict with the Constitution of the State of California, such an allegation being but a legal conclusion could not prevail against the law itself.

The court judicially knows the law, and an averment con trary thereto will be disregarded.

1 Daniells, Ch. Pl. & Pr., 602.
11 Story, E. Pl., 254, b.
Gould vs. Evansville & C. R. R. Co., 91 U. S., 526, 536.
12 Enc., Pl. & Pr., 1024, *et seq.*
Brown vs. Newall, 2 Myl. & C., 576.
Barnham vs. San Jose, 24 Cal., 587.
Ohm. vs. San Francisco, 92 Cal., 437.
Lynch vs. Forbes, 161 Mass., 302.

We contend that the power could not be conferred on the

city to regulate rates of telephone companies because to do so would be denying the equal protection of the laws. We support this argument by references to the constitution and decisions of the State, which on principle seem to recognize that it is a subject for a general or uniform law. But since there is no general law on the subject the city charter prevails as being the organic law, unless contrary to the Constitution of the United States.

The contention of appellees that this court has no jurisdiction because we do not claim the charter is void as being in conflict with the Constitution of the United States, is not true. For the city to claim that this court has no jurisdiction because it did not have power to pass the assailed ordinances which appellant alleges impair the obligation of a contract and deprives appellant of property rights is inconsistent with the entire conduct of appellees as shown by the bill. The case falls clearly within the opinion upon the subject of jurisdiction rendered in Cleveland City Ry. Co. vs. Cleveland, 194 U. S., 517, 530.

There the city of Cleveland had power to make a contract concerning rates. It made a contract by ordinance in 1879, but reserved the power therein to subsequently change the rates. After the adoption of this ordinance the city of Cleveland passed other ordinances which resulted in a contract between it and the street car company by which the city contracted away the reserved right it had by the ordinance passed in 1879. Then the city without authority from the State to fix rates assumed power by virtue of the reservation of the ordinance passed in 1879 to regulate the rates. The city did not have any such power but the court held that the bill presented a Federal question and used the following language (194 U. S., 517, 530):

> "(b) That there was no jurisdiction, even although the complainant relied upon contracts arising from the

ordinances adopted subsequent to that of 1879. To constitute the impairment of a contract within the sense of the constitution, it is correctly argued, requires that some subsequent action taken by the State or under its authority should have been given effect as against the contract. The argument is that as there had not been delegated by the State of Ohio to the city of Cleveland independent authority to reduce rates on street railroads, and as the power asserted by the assailed ordinance was based solely on the right reserved in the ordinance of 1879, it follows that the assailed ordinance, even if unwarranted, was not an impairment of a contract right in the constitutional sense.

"This proposition is in conflict with the one just considered, and in effect assumes that the defense of the city was without merit, and hence there was no jurisdiction. But irrespective of the assumption upon which it rests, the proposition is untenable, and the argument by which it is sought to be sustained is somewhat wanting in consistency. The passage by the city of the assailed ordinance necessarily amounted to an assertion on its part that the legislative authority vested in it to pass the ordinance of 1879 gave the continued power to pass subsequent ordinances executing the rights initiated by the ordinance of 1879, despite the ordinances which had supervened. *This in its very essence was the assertion of a delegated power to legislate against the contracts embodied in the ordinances relied upon.* We have said that the argument is somewhat wanting in consistency, because the contention of the city on the record is that the ordinances asserted as contracts, passed subsequently to 1879, did not deprive the city of the continued power to exert authority as to rates, because the statutes of Ohio prevented the city from abrogating by the subsequent contracts, the rights reserved in the ordinance of 1879. And this is but to assert that, as a consequence of the continued effect of the legislation of the State of Ohio, the city had the power to pass the assailed ordinance, even although it had apparently disabled itself from so doing by the passage of many ordinances adopted after 1879 and up to

the time when the assailed ordinance was passed. These considerations distinguish this case from Hamilton Gaslight & Coke Co. vs. Hamilton, 146 U. S., 258, 36 L. Ed. 963, 13 Sup. Ct. Rep., 90, and St. Paul Gaslight Co. vs. St. Paul, 181 U. S., 142, 45 L. Ed. 788, 31 Sup. Ct. Rep., 575, relied upon by the appellant."

The bill in this case shows that the passage by the city of the assailed ordinances necessarily amounted to an assertion on its part that the legislative authority vested in it by Section 31 of the charter gave the continued power to pass subsequent ordinances executing the rights initiated by Ordinance B and despite the terms thereof. The conduct of the city of Los Angeles in its very essence is the assertion of a delegated power to legislate against the contract embodied in Ordinance B. If the bill in the Cleveland case had asserted that the city of Cleveland did not have power under the constitution and laws of the State of Ohio (which it did not have) to enact the assailed ordinances the bill would have alleged exactly what this court decided in that case to be the law, and according to the argument of appellees, such an allegation would have deprived the Federal Court of jurisdiction.

The case at bar is also within the rule announced in Hamilton Gaslight Co. vs. Hamilton, 146 U. S., 258, 265.

See also authorities cited in Brief for Appellant.

In the case at bar the State by Section 8, Article XI, has given the city power to adopt this charter and the city has included therein Section 31. Thereby the State has given sanction to the city to pass these ordinances. The city has acted under this supposed legislative authority and has grounded its right to enact the ordinances in question upon its charter adopted in pursuance of the constitution of the State. The bill in this case shows plainly that the city supposed it had the power to adopt these ordinances and the

city claims here that it had the power to adopt them. If the city has power to adopt these ordinances they impair the obligation of the contract. In so far as the constitution of California is concerned the provision of the charter is valid. This the court below decided, the appellees now so contend and we agree that this is the law.

A further illustration of the wide extent of the powers which the appellees claimed the city of Los Angeles has, is shown by paragraph II of Appellee's Brief. In this paragraph of the brief the appellees argue that cities throughout the State, which of course would include the city of Los Angeles, have authority by virtue of their general police power to regulate telephone rates. We disagree with counsel for appellee, that rates may be regulated by virtue of the general police power of a city, but since this is but a subordinate question we content ourselves by citing the following authorities upon the subject:

Mills vs. Chicago, 127 Fed., 731.
State vs. City of Sheboygan, 111 Wis., 23, 86 N. W., 657;
Tacoma El. L. & G. Co. vs. City of Tacoma, 14 Wash., 288, 44 Pac., 655;
St. Louis vs. Bell Telephone Co., 96 Mo., 623;
State vs. Laclede Gaslight Co., 102 Mo., 472; 22 Am. & E. Cy., 914.

## II.

## THE PROVISIONS OF THE CHARTER WITH RESPECT TO THE CONDUIT DISTRICT CONSIDERED AS A CONTRACTUAL FEATURE IN THE FRANCHISE.

At page 186 of appellees' brief attention is called to the fact that the franchise prescribes a conduit district and re-

quires the holder of the franchise to construct its system in a conduit within a certain prescribed district. Then the appellees' brief asserts that appellant might as well contend that these provisions of the franchise constitute a contract as well as the provisions of the charter relative to rates. Appellees say that it is a fact that under ordinances passed by the City Council since appellant's franchise was granted, the appellant has been required to and has laid many such conduits in the public streets in Los Angeles outside of the district described in its franchise and that the appellees have not been advised that the appellant has complained by reason of these exactions. It is true that the appellant has been expensively afflicted with the ordinances of the city regarding the conduit district and the appellant has made no complaint in the courts concerning the exactions of the city in this regard, though appellant probably might have justly made such complaint under the rule laid down by this court in the case of Dobbins vs. Los Angeles, 195 U. S., 223, as being an arbitrary exercise of the police power by the city.

The provisions of the franchise referred to by appellees aforesaid are very readily distinguishable from the provisions contained in the franchise relative to the fixing of rates.

The provisions concerning the conduit district are matters that affect the purely police powers of the city. An abrogation of those might work a destruction of the city. Wires, for instance, strung in the air may become so dangerous by reason of preventing adequate fire protection that the city in self-preservation would have a right to require their removal. This is a police power which cannot be contracted away. All the decisions recognize the distinction between the right of a city to contract away purely police powers and the right to contract away a mere governmental power, such as the fixing of rates. Section 31 of the charter in its language recognizes this distinction.

## III.

## COMMENT ON AUTHORITIES CITED FOR APPELLEES.

The brief for appellees correctly apprehends the contention for appellant, when it states it to be that the City of Los Angeles had the power to fix telephone rates contractually in its grant of appellant's franchise and that it did so fix them for the term of that franchise.

On the other hand we understand the contention on the part of the appellee to be that the power of the City Council to fix and determine rates cannot be exercised contractually; and that if it can be, that it has not been so exercised in the proceedings for the sale of the franchise which were consummated in the passage of ordinance "B."

We content ourselves with a discussion of those questions submitted in the opening brief for appellant, which seems to us to meet all points of view as presented in the brief for appellees.

It seems proper, however, to comment briefly on the cases in this court, cited and relied upon for appellees in support of the contentions in their behalf. They are:

Freeport Water Co. vs. Freeport, 180 U. S., 587.
Danville Water Co. vs. Danville, 180 U. S., 619.
Rogers Park Co. vs. Fergus, 180 U. S., 624.
Knoxville Water Co. vs. Knoxville, 189 U. S., 434.

These cases were all in error to state courts.

The Freeport, Danville and Rogers Park cases were decided by a majority of the court following the construction put by the Supreme Court of Illinois upon certain statutes of that State. Such a construction amounted to a denial that such statutes conferred upon the municipality power to fix rates for any definite time, or for any time other than at the pleasure of the municipality. Vicksburg vs. Vicks-

burg Water Works Co., 206 U. S., 496, 508; Omaha Water Co. vs. City of Omaha, 147 Fed. 1, 9-10.

These Illinois cases were cited, commented upon and distinguished in the Omaha case. Omaha Water Co. vs. City of Omaha, 147 Fed., 1, 9-10.

They were also necessarily before the Supreme Court of Alabama in its consideration of the Omaha case in Bessemer vs. Bessemer Water Works, Ala., 44 So., 663, 668.

And, as they were not found to be in point in either of these cases, so they are not in point here. For as we have shown in our opening brief (pp. 32-88) there was no lack of power to contract as to rates for the term of the franchise and no reservation of power to regulate rates during the term covered by the contract and notwithstanding the contract.

As referred to in our opening brief, the case of Knoxville Water Co. vs. Knoxville, 189 U. S., 435, was carefully considered in the opinion of the Circuit Court of Appeals for the Eighth Circuit in Omaha Water Co. vs. City of Omaha, 147 Fed., 1, 9-10, and distinguished from the Omaha case.

The court quoted from the opinion of this court in the Knoxville case the following passage:

> "We do not mean that under other circumstances words which on their face only express a limit might not embody a contract more extensive than their literal meaning. Detroit vs. Detroit Citizens' St. Ry. Co., 184 U. S., 368, 22 Sup. Ct., 410, 46 L. Ed., 592. But in that case the rate was fixed by an ordinance which was the language of the city, the ordinance was under a statute which declared that the rates should be established by agreement between the city and the railway company and neither statute nor ordinance reserved a power to the city to alter rates."

And thereupon said, "Why does not this description of the Detroit case portray the case in hand?"

So we submit, that we may with the utmost propriety say, "why does not this description of the Detroit case, adopted by the Circuit Court of Appeals as portraying the Omaha case, describe the case now before the court?"

*The Freeport, Rogers Park and Knoxville cases differ from this case in the important feature that they involved contracts for EXCLUSIVE privileges, whereas, this case does not.*

In the Freeport and Rogers Park cases from Illinois and in the Knoxville case from Tennessee the public service companies were given exclusive privileges and had a monopoly of the business of supplying water to their respective municipalities for the respective terms of the contracts or ordinance contracts. (180 U. S., p. 589; 180 U. S., p. 625; 189 U. S., p. 436.)

This feature was noticed as a material element in the majority opinion in the Rogers Park case. *Supra*, 180 U. S., at p. 630.

These three cases differ in that respect from the case before the court here, for there is here no exclusive right or monopoly, but a contract status to perpetuate strict competition throughout the term.

*The stipulations for continuous competition make this case unique and distinguish it, in a peculiar respect from the cases relied upon by appellees.*

The provisions for perpetuating competition which are made by section 10 of ordinance "B" a permanent feature of the contractual relation between complainant and the City of Los Angeles has an important and obviously direct bearing upon rates. It is an addition to the maximum limitation of rates for the safeguard of the city, a further

provision for the benefit of the city and its inhabitants, and subjects such maximum rates to reduction and modification by competition; and it must have been so intended by the parties to the sale and purchase of the franchise.

But if the city had intended to reserve the power to reduce the maximum rates fixed in the ordinance "B" and that had been the mutual understanding of the parties, then certainly the stipulation looking to perpetuating competition would have had no function as respects the rates. For why stipulate for a reduction of rates by the process of competition if the power is reserved to do so by merely passing an ordinance once a year, or at any other interval at the pleasure of the Council.

We submit that this is a weighty circumstance which distinguishes this case from those relied upon for appellees; and that in this respect it is a stronger case for the maintenance of the ordinance contract than are either the Detroit, Vicksburg or Cleveland cases.

In the Rogers Park case the court said, to induce the investment of capital and for its security, the obligation of an exclusive contract might be sought and given. (180 U. S., 630.) This could not be done in the case at bar for the field was occupied by an opponent. Since the courts had decided that a company exercising a public franchise was only entitled to rates that would yield an income upon the value of the plant, regardless of the amount of money invested and regardless of the amount of interest contracted to be paid upon its bonds (Redland Water Co. vs. Redland, 131 Cal., 365; San Diego Land & Town Co. vs. Jasper, 189 U. S., 439); since this court decided (Covington Turnpike vs. Sandford, 164 U. S., 578. See Appellees' Brief, p. 193) that the rates should be reasonable and just to the public regardless of the rights of the stockholders to earn dividends; since this was in its very nature a hazardous undertaking, and since it could not be expected that any person would buy a franchise and pay for the poor privilege

of allowing a Common Council to fix the rate of income to be received from his investment, based upon the value of a plant; in order to induce the investment of capital and for its security, an obligation as to rates was tendered for sale and bought.

We respectfully submit that the argument for appellee is not well taken and that the decree should be reversed.

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A. HAINES,
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[redacted]

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IN THE

# Supreme Court of the United States.

**OCTOBER TERM.**

**No. 441.**

**Home Telephone and Telegraph Company,**
*Appellant,*

*vs.*

**The City of Los Angeles, A. C. Harper, Mayor, and R. W. Dromgold, et al., Members of the Common Council,**
*Appellees.*

## BRIEF FOR APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, FROM A DECREE ENTERED AUGUST 5TH, 1907, DISMISSING THE AMENDED AND SUPPLEMENTAL BILL OF COMPLAINANT.

### STATEMENT OF THE CASE.

The Home Telephone and Telegraph Company, a corporation of the state of California, filed July 27th, 1907, in the Circuit Court for the Southern District of California (Southern Division) its amended and supplemental bill of complaint (hereinafter referred to as the bill) against the City of Los Angeles, a municipal corporation

of California, and against the mayor and members of the common council of said city.

The relief sought is to restrain the enforcement of three ordinances of said city, set forth as exhibits "C," "D" and "F" of the bill [Trans. pp. 26, 33, 34], as being in violation of the rights of complainant, acquired under assignment to it by M. A. King, of a franchise purchased by him from the City of Los Angeles, to construct, maintain and operate within said city a telephone system, which said franchise had been granted to him by an ordinance of said city, set forth as "Exhibit B" of the bill. [Trans. p. 21.] Said ordinance was passed by the council on February 5th, 1902, and was approved by the mayor February 6th, 1902, and is hereinafter referred to as "Ordinance B."

The bill charges against said ordinances "C," "D" and "F," passed subsequent to ordinance "B," among other things, that they are void because they violate article 1, section 10, clause 1, of the constitution of the United States; also, article 14 of the amendments to the constitution of the United States, in that, if the enforcement of them is permitted by the court, they will impair the obligation of the contract expressed in said ordinance "B," and will deprive complainant of its property rights without due process of law,—and will abridge the complainant's privileges and immunities under said ordinance "B;" and will deprive it of the equal protection of the law; and, that, in connection with the ordinances set forth as exhibits "E" and "G" of the bill, which purport to fix much lower rates for telephone service by the Sunset Telephone and Telegraph Com-

pany, a similar and competing corporation, such ordinances "C," "D" and "F" will discriminate against complainant and deprive it of the equal protection of the law.

The ordinances so set forth as exhibits "C," "D," "E," "F" and "G" of the bill are hereinafter designated, when not otherwise referred to, by their respective letters as such exhibits.

**Substance of the Bill.**

The allegations of the bill so far as material to the particular errors asigned on this appeal are substantially as follows:

That complainant has the corporate power to engage in the telephone business within the state of California.

That the City of Los Angeles, since 1888 has been, and now is, organized as a municipality under a charter adopted in pursuance of the constitution of the state of California (Stats. of Cal. 1889, pages 445, 512), a copy of which charter is filed herewith.

That said charter is divided into 23 articles, the first of which declares the corporate powers of said city, the second names the officers, and the third defines the powers of the common council.

The first article declares the city shall have power to manage, control, sell, lease or otherwise dispose of, any or all of the property of the corporation, to provide a proper and efficient fire department, to make and enforce within its limits such local police, sanitary and other regulations as are not in conflict with general laws, etc., and to exercise all municipal powers necessary for the

efficient administration of the municipal government, whether such powers be expressly enumerated or not, except such powers as are forbidden, or are controlled by general laws, and this article provides that all the powers of the city shall be exercised by ordinance except as otherwise provided.

Article III defines the powers of the common council of the city, provides that all legislative power of the city is vested in the council, subject to the power of veto and the approval of the mayor, and shall be exercised by ordinance. (This power of legislation was subsequently amended by provisions for initiative and referendum.) Article III further provides that no ordinance shall be passed and no act done, granting a franchise, making any contract, disposing of or leasing the city property unless two-thirds of the whole council vote in favor of it.

Section 31 provides that said council shall have power by ordinance to regulate telephone service and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service and connections and to prohibit or regulate the erection of poles for telegraph, telephone or electric wire in the public grounds, streets or alleys, and the placing of wire thereon, and to require the removal from the public grounds, streets or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone, or electric wires, and section 33 provides that the council shall by ordinance provide for maintaining a fire alarm and police telegraph system and for the cleaning and sprinkling of graded and accepted streets.

That prior to June 24th, 1901, an application for the

franchise desired and set forth in the ordinance "B," made an exhibit of the bill, was filed with the common council of the said city by M. A. King; that said common council in its discretion, and pursuant to an act of the legislature of California, approved March 11th, 1901 (see supplement as per index), and in accordance with the charter of said city, advertised the fact of said application, together with a statement that it was proposed to grant the same, and invited sealed bids for said franchise.

A copy of the notice is set out as exhibit "A" of the bill. [Trans. p. 20.]

That at the time designated in such notice sealed bids were received therefor, which were duly raised by responsible persons and that such franchise was finally struck off and sold to M. A. King as the highest bidder therefor.

That thereupon said M. A. King filed his bond as required by said act of March 11th, 1901, which was duly approved and that he otherwise complied with said act.

That thereupon said common council duly passed and adopted by unanimous vote of its members, said ordinance "B," on February 5th, 1902, and that the same was approved by the mayor of said city on February 6th, 1902, all in accordance with said statute and the city charter.

That complainant is the owner of said franchise and of the telephone system constructed and operated thereunder.

That said act of March 11th, 1901, was enacted in substitution of a similar act approved March 23rd, 1893,

and an amendment thereto approved March 19th, 1897 (See supplement as per index.)

That since March 11th, 1901, many franchises for telephone plants have been granted by municipalities in California; that each such franchise specifies the maximum rate, as in said ordinance "B," to be charged for services under the franchise.

And that many of said telephone systems within such municipalities are connected with the system built under said franchise within the city of Los Angeles.

That although since the passage of said acts hundreds of franchises, many of which provide rates of compensation for the grantees, have been sold thereunder by the City of Los Angeles and other municipalities within this state, and although various questions which arose under such franchises have been before the state and federal courts, until the City of Los Angeles undertook by the ordinances "C," "D" and "F" to reduce the maximum of rates fixed in said ordinance "B," there was never any contention that the rates fixed in such franchises were not contractual, or that they were subject to change, alteration or reduction during the term of the franchise.

That complainant and its predecessors in interest in said franchise, at all times were advised and verily believed that under said acts, municipalities in California had power to fix rates in franchises granted for such term as the legislative bodies thereof might deem reasonable, and that they had no power to alter or reduce such rates during the term.

That immediately upon the taking effect of said ordinance "B," the assignors of this plaintiff, pursuant to

the terms thereof, commenced the work of constructing and laying down the conduit required by said ordinance in the district therein described, and continuously prosecuted said work in good faith and completed the same in full compliance with the conditions of said ordinance relating thereto, and within the period therein prescribed, so that within said period a complete conduit system was established of sufficient capacity and extent to accommodate at least 10,000 subscribers and to provide a general telephone service in all parts of said telephone conduit district, and that likewise the said assignors of this plaintiff did, pursuant to the terms and conditions of said ordinance and in good faith expend for material and labor used and performed in the construction and installation in connection therewith of wires, switchboards and telephonic apparatus and appliances, and within the times specified in said ordinance sums greatly in excess of the sums therein specified to be so expended, and did so expend more than the sum of $200,000 within the thirty-six months after the grant of the said franchise.

That the assignors of the plaintiff did also, within the periods of said ordinance provided, after the grant of said franchise, file a statement, verified as therein provided, showing in detail the sums expended, as required by and in compliance therewith, and did also cause to be erected and maintained poles of a size and character satisfactory to the street superintendent of said City of Los Angeles, and that the assignors of said plaintiff and this plaintiff have executed and complied with and observed, and that the said defendant, the City of Los Angeles, has never at any time claimed or pretended that the

plaintiff's assignors and this plaintiff had not executed, complied with and observed the terms, covenants and provisions of said ordinance as aforesaid.

That all the work done and performed by plaintiff's assignors and by this plaintiff as aforesaid, and the expenditures made by it for any and all equipment and appliances as aforesaid, were made, done and performed pursuant to and in reliance upon the terms, covenants and provisions of said ordinance "B" of said city of Los Angeles, and not otherwise; and that the system of plaintiff in said City of Los Angeles is now and has been at all times maintained and operated pursuant to and in reliance upon the terms, conditions and covenants of said ordinance and not otherwise, and that plaintiff has no rights or property in the said City of Los Angeles except such as were acquired under the said ordinance "B."

That pursuant to the powers vested in it by law and the provisions of said charter, and in order to provide for maintaining a fire system and police telegraph system, the said defendant the City of Los Angeles required in and by section 8 of the said ordinance that this plaintiff should furnish to the said City of Los Angeles, if required by it, free of any charge at all during the life of the said franchise granted by said ordinance, the use of all necessary conductors, not exceeding 150 pairs in said conduit, for the uninterrupted use of a fire system and police system of said city, and for like purpose the free use of the top cross arm on each of the poles erected or maintained under said franchise during the whole of the term thereof; that this plaintiff in constructing and laying said conduits and in constructing and erecting its

pole lines and in providing its equipment, made provision for 150 pairs of lines in said conduits and for the maintenance and operation thereof, and provided said top cross arms on each of said poles, and in all respects and at additional cost and expense to it arranged to comply with such provisions of said ordinance, and is now, and at all times has been, able and willing to furnish said conductors, and has as aforesaid reserved the top cross-arm on each of said poles for the use of said city.

That it is also provided in and by section 8 of said ordinance that there shall be furnished to the said City of Los Angeles, free of any charge 30 telephones which shall be connected with the telephone system of the plaintiff, and that this plaintiff did, within the time provided and specified in the said franchise, so furnish to the defendant said 30 telephones, and did connect the same with the telephone system of this plaintiff, all at its own cost and expense, and without charge to the said City of Los Angeles, and that said City of Los Angeles is now and ever since has been, using free of charge as aforesaid the said 30 telephones.

That section 1 of said ordinance provides:

"That said conduit, said poles, and the wires enclosed "therein or attached thereto, shall be constructed, erect-"ed and installed, and at all times maintained, and said "right, privilege and franchise is hereby granted, and "shall at all times be exercised and enjoyed, in accord-"ance with and subject to each and every of the terms "and conditions of this ordinance and not otherwise."

That section 9 of said ordinance provides:

"That all telephone lines constructed or operated un-"der said franchise shall have complete copper, metallic

"circuits, and that the conduit system constructed and "laid down under said franchise shall be of such size and "capacity as to accommodate wires, cables and conduc- "tors, sufficient to provide for ten thousand telephones.

"That the rent or charge for unlimited, independent, "metallic circuit, telephone service, in the system estab- "lished or maintained under the said franchise, so long "as said system does not connect and exchange with more "than 10,000 telephones, shall not exceed $60 per annum "for a telephone installed in any business office, or $30 "per annum for a telephone installed in a private resi- "dence, and that when said system shall comprise more "than 10,000 telephones, the annual rental or charge for "the telephone service shall not be increased by more "than a sum equal to $6.00 per annum for each one thou- "sand telephones in said city connected with said tele- "phone system in excess of 10,000."

That section 10 of said ordinance provides:

"That except as herein provided, said grantee or his "assignors, shall not without the consent of the city ev- "idenced by ordinance, sell or transfer the conduits, "poles, wires, or appliances of any kind or description, "or sell, lease, transfer or assign any of the rights, or "privileges herein authorized or granted to any person, "company, trust, or corporation now, or hereafter en- "gaged in the telephone, telegraph or conduit business, "or to any person for any purpose, and shall not at any "time enter into any combination, directly or indirectly, "with any person or persons or any corporation now, "or hereafter, concerning the rate to be charged for tel- "ephone or telegraph services, and no officers, employees, "or managers of the conduit or telephone system, author- "ized under this franchise, shall at any time be in charge "of or be officers, employees, or managers of any other "conduit or telephone system constructed or being op- "erated in said city."

The bill further alleges that the cost of installation, maintenance and operation per telephone is very much

greater proportionately as the number of telephones increases: That is to say, after a unit of 10,000 telephones has been installed and is being operated, the cost thereafter is proportionately much larger for each added telephone, and that for this reason the defendant, the City of Los Angeles, fixed said increasing rate as specified in said franchise.

That the rate established by said franchise was at said time lower than any which had ever been charged for telephones in said city, and lower than any other company than complainant now charges for telephone service in said city, and that there was not at any time any system of telephone lines with complete copper metallic circuits, other than the system of complainant. That at the time of the advertising and sale of said franchise, there was in operation in said City of Los Angeles, one system of telephonic communication, only, and that the corporation owning the same continues to do business in said city.

That for many years prior to the sale of said franchise the telephone service provided for the residents of the City of Los Angeles was in the hands of said one corporation, which had a monopoly of such business; that the wires, pole lines, equipment, system and service of said last mentioned corporation were of the most inferior description, and as a consequence the residents of said city were greatly desirous of having a competing system, and particularly such a system as was and is described and provided for by the franchise now owned by the complainant. That at the time said franchise was advertised for sale and sold the city required the use of

150 pairs of lines as provided for in said franchise, and the use of the top cross-arm of each pole to be erected under said franchise for the fire alarm and police telegraph system of said city, and said city needed the use of thirty telephones, as provided in said franchise; that all of said telephones have been used by the said city ever since the construction of said plant of complainant, and are now used by the city, and the city is using some of the lines in the conduit of complainant, and the top cross-arm of some of its poles, and the city has need for the things it is using as aforesaid, for public benefit and in discharge of its functions.

That the reasonable value to the said City of Los Angeles of the use of said 30 telephones provided by said franchise to be furnished free of charge, and the free use of one hundred and fifty pairs of lines for the fire system and police telegraph system of said city, and the free use of the top cross-arm on each of the poles erected and maintained under said franchise, is and will be, during the life of said franchise, of the sum of four hundred and fifty thousand dollars. That two per cent. of the gross annual receipts required by said franchise to be paid to the city of Los Angeles will amount to more than the sum of five hundred thousand dollars.

That no other telephone company operating in said city is required to pay to said city any of its receipts nor to furnish to said city free service of any kind, and that the greatly increased growth of said City of Los Angeles, both in population and territory, has greatly increased the expense to complainant in furnishing said free telephone service to the City of Los Angeles, and

said service for its police and fire departments, and will continue so to increase during the life of the said franchise.

That complainant and its assignors, acting under and pursuant to the terms of this franchise and not otherwise, and particularly in the belief that the clauses thereof declaring maximum rates, could not be changed nor the rates reduced during the life of said franchise, have constructed more than five miles of underground conduit and constructed more than one hundred miles of pole lines, and have installed more than twenty thousand telephones in said city, and have, in compliance with said franchise, and at great additional expense, constructed and erected and are now operating a system of telephone lines having complete copper metallic circuits.

That in full reliance upon its right to charge the full rates fixed by said franchise, if it so desired, and for the purpose of procuring such money as was necessary that it should have for the construction of said telephone system, complainant issued bonds, and borrowed thereon the money so needed; that complainant has issued for the purpose aforesaid, bonds amounting to two and one-half million dollars, payable in gold coin with semi-annual interest at the rate of five per cent. per annum, that all of said bonds outstanding are secured by a mortgage or deed of trust, by the terms of which all the property rights, privileges and franchises of complainant, including the franchise or right fixed by said franchise, to charge the rates of toll therein named, together with all the tolls, issues, earnings, and profits arising therefrom, have been mortgaged to trustees therein named, for the

use, benefit and security of the holders of such bonds, and such bonds have been sold to parties purchasing the same in full faith and belief that the complainant had the right to charge the full rates fixed by said franchise, without any right on the part of said City of Los Angeles, or any board or officer thereof to interfere, lessen, reduce or impair the same, and said right to have and receive the rates so fixed being so mortgaged as a part of the security for the payment of said bonded indebtedness, the action of said city by the adoption of section 12 of the ordinance hereto attached and marked exhibit "C" and ordinance marked exhibit "D," is an impairment of the obligation of said contract as against the rights of said bondholders under and by virtue of the security created by said various mortgages and in contravention of section 10 of article 1 of the constitution of the United States as herein more specifically set forth.

The bill further alleges that complainant has no means of providing money for the extension of its system and for constructing additional pole lines and supplying additional telephones to the inhabitants of the City of Los Angeles, except by the sale of its bonds and stock, and that owing to the passage by said common council of said ordinances "C" and "D," complainant is unable to sell said securities except at a great loss to it, and is unable to secure moneys wherewith to construct pole lines and supply telephones to meet the demands made upon it for telephone service by the residents of said City of Los Angeles.

That it has in use more than twenty thousand telephones in said city; that if ordinance exhibit "D" is left

in force and the enforcement thereof is not restrained, or the same is not declared void, many patrons of the telephones will refuse to pay the rates fixed in said franchise, and demand that complainant accept for the use of said telephones the rates of charge specified in the ordinance "D," and will refuse to pay the additional charge to which complainant is entitled by virtue of said franchise and thereby complainant will be put to a great deal of vexatious litigation. If complainant undertakes to remove said telephones from the said subscribers' buildings, there will be conflicts, and law-suits will grow out of any attempt by complainant to remove said telephones by reason of the subscribers failing to pay the rates prescribed by said franchise, and as a result, complainant will be put to great loss, damage, hindrance and annoyance in the transaction of its business which it is entitled to carry on without such suits, litigation, actions, annoyances, hindrances, loss and damage.

That on the 27th day of March, 1905, the defendant by its common council passed said ordinance "C." That complainant has not complied with section 12 of said ordinance "C" nor any part thereof, and declines to comply therewith for the reason in the bill set forth.

That in pursuance of the terms and conditions of said section 12 of ordinance "C," the defendant on the 7th day of February, 1906, commenced a prosecution in the police court of the City of Los Angeles, against J. M. C. Marble, the president, and J. S. Torrence, the secretary, and W. C. Patterson, A. B. Cass, H. W. Hellman, Thomas W. Phillips and W. S. Bartlett, directors of complainant, and charged said president, secretary and

directors with having committed a misdemeanor in that they did wilfully and unlawfully refuse to comply with said section 12 of ordinance "C," and thereupon, upon complaint filed in said police court by the said defendant, the said defendant caused the arrest and detention of said Marble and Torrence upon a warrant issued by the said police court of the said City of Los Angeles, for the violation of said section 12 of said ordinance "C." And complainant alleges that the defendant, through its officers and agents, threatens to and will, unless restrained by the court, continue to arrest and prosecute the said president and secretary and directors, each and every day that complainant shall refuse to comply with such section 12 of ordinance "C" and will with like penal ordinances continue to prosecute the officers of complainant to compel it to permit its rates to be changed. That the said Marble and Torrence, president and secretary of complainant, are now in the custody of an officer of said defendant, or have given their recognizances for their appearance and to answer said criminal charge made by said city aforesaid, in pursuance of said section 12 of ordinance "C."

Complainant further alleges that in violation of its rights as fixed and determined by said ordinance "B," and contrary to the express terms and provisions thereof, the said defendant, the City of Los Angeles, by its common council, did on the 28th day of February, 1906, pass and adopt said ordinance "D." That the rates prescribed and fixed by said ordinance "D" are different, lower and less remunerative than the rates agreed upon in said ordinance "B," and if said rates fixed by ordi-

nance "D" are enforced, it will deprive complainant of a large amount of money, to-wit, more than the sum of twenty-five thousand dollars per annum.

That, in and by said ordinance "D," complainant is forbidden under penalty of fine and imprisonment from collecting the rates provided and fixed and agreed on in said ordinance "B."

And, that the said defendant, the City of Los Angeles, claims the right to, and will, unless restrained by the court, pass and adopt hereafter, from time to time, other ordinances in violation of the terms and provisions of said ordinance "B," and will thereby fix and determine and lower the rates for telephones and telephone service that are prescribed and agreed upon in said ordinance "B," and will prevent complainant from charging the rates fixed in said last mentioned ordinance, and will attempt to enforce its ordinance so lowering said rates as against complainant by the arrest and imprisonment of its officers, in case complainant should charge the rates so fixed in said ordinance "B."

That on the said 28th day of February, 1906, the said defendant, the City of Los Angeles, did by its common council pass and adopt the ordinance "E" [Trans. pp. 34-51, whereby it declared that the Sunset Telephone and Telegraph Company, a competitor of complainant in the City of Los Angeles, engaged in like business, should be allowed to charge for telephone services sums greatly in excess of that which by said ordinance "D" complainant was permitted to charge.

That said ordinance "D" is void and of no effect, for

that it is not a general law or rule adopted by defendant, the City of Los Angeles, for the government of all corporations similar in character to complainant but is directed solely against and applicable only to complainant and discriminates against complainant as hereinbefore shown.

That said ordinances "C" and "D" are invalid and of no effect, for that said defendant, the City of Los Angeles, has not, nor has it ever had, under the constitution and laws of the state of California, any power or authority to regulate or fix rates to be charged by telephone corporations for services rendered by them, except that the said City of Los Angeles had and has the power to contract for rates to be charged, and had and has the right to contract in the manner and form as shown by said ordinance "B."

That if the provisions of the charter of said City of Los Angeles purport to give it the right to fix rates other than by contract, or purport or attempt to give it a continuing power to fix and regulate rates, such provisions of such charter are void, for that, in and by the constitution of the state of California, the power to fix such rates (if such power exists at all) can only be exercised by authority of a general law applicable to all municipalities and affecting all corporations similar to complainant and that the legislature of the state of California has no authority by virtue of said constitution or otherwise to delegate the power of so fixing rates from time to time to any one municipality or other political sub-division of the state, to the exclusion of the others and has no au-

thority by delegation of its powers to fix the rates to be charged by complainant.

That the legislature of the said state of California has never passed nor adopted, nor is there now or has there ever been in force, any general law or statute authorizing the fixing and regulation of rates as aforesaid, but that such general power has been and is withheld from other cities and municipalities within the state.

That at the time of the adoption of said charter by said City of Los Angeles in the year 1888, there was and had been in said City of Los Angeles a telephone system having more than ten thousand telephones, operated by a corporation known as the Sunset Telephone and Telegraph Company. That the franchise under which said system was and is operated does not fix or in any way determine, or attempt to determine, the charge to be made for service or for the use of telephones or telephone connections. That the said City of Los Angeles never took any steps, or passed any ordinance, or any order concerning the regulation of the rates to be charged for telephone service within the said city until the adoption of said ordinance "C," which ordinance "C" was passed and adopted by said defendant, the City of Los Angeles, on the 27th day of March, 1905.

And the bill further alleges by way of supplement, that the common council of said defendant, the City of Los Angeles, did, on the 15th day of March, 1907, pass and adopt the certain other ordinance "F" [Trans. p. 36]. That the rates prescribed and fixed by said ordinance "F" are different, lower and less remunerative than the rates agreed upon in said ordinance "B" and if the rates

fixed by said ordinance "F" are enforced against complainant, it will deprive the complainant of a large sum of money, to-wit, more than the sum of thirty thousand dollars ($30,000) per annum. That in and by said ordinance so adopted on said 15th day of March, 1907, complainant is forbidden under penalty of fine and imprisonment from collecting the rates provided and fixed and agreed upon in said ordinance "B."

That on the 15th day of March, 1907, the said City of Los Angeles did by its common council pass and adopt a certain other ordinance "G" [Trans. p. 37] whereby it declared that said Sunset Telephone and Telegraph Company, a competitor of this complainant in the City of Los Angeles, engaged in like business, should be allowed to charge for telephone service sums greatly in excess of that which by said ordinance "F" this complainant is permitted to charge.

And the bill further avers that said ordinance "F" is void and of no effect, for that it is not a general law, and rule adopted by said City of Los Angeles, for the government of all corporations or persons similar in character to complainant, but is directed solely against and is applicable only to this complainant, and discriminates against this complainant as hereinbefore shown.

That complainant has no plain, speedy or adequate remedy in the ordinary course of law.

The prayer is for an injunction commanding said defendants and each of them, and their agents, servants and employees from enforcing, or in any manner putting into effect said ordinances "C," "D" and "F," and enjoining the defendants, and each of them, from fixing or

determining charges for telephone and telephone services and connections of complainant in the City of Los Angeles now or hereafter, and from in any manner violating the provisions, terms and conditions of said ordinance "B;" that upon final hearing a decree be made that said ordinances "C," "D" and "F" are void and of no effect, and that the said defendants, and each of them, be enjoined from in any manner enforcing said ordinances "C," "D" and "F," and for such other relief as the equity of the case may require.

**Demurrer to Bill of Complaint.**

THE DEFENDANTS DEMURRED TO THE BILL OF COMPLAINT ON THE FOLLOWING GROUNDS:

1. That the same does not state such a case or contain any matter of equity entitling the complainant to any relief against the defendants or any of them.

2. That the subject matter of the suit is not within the jurisdiction of the Circuit Court sitting in equity; and that it is without jurisdiction either of the subject matter or of any of the parties thereto; that the bill does not show a controversy arising under the constitution or laws of the United States or treaties made under their authority.

3. That the bill is vague and uncertain in that it does not appear from it whether the rates prescribed in and by said ordinance "D" are reasonable or unreasonable, just or unjust; nor whether the rates prescribed in ordinance "E" are reasonable or unreasonable, just or unjust.

That the bill is further vague and uncertain in that it

does not appear therefrom how or in what manner the adoption or enforcement of ordinances "C" or "D" will impair the obligation of the contract set forth in ordinance "B," or deprive complainant of its property without due process of law; or abridge the privileges and immunities of complainant or deprive it of the equal protection of the law; or how or in what manner the adoption of the said ordinances "D" and "E" will deprive complainant of the equal protection of the law or discriminate against complainant in favor of the Sunset Telephone and Telegraph Company; or how or in what manner the adoption of said ordinances "D" and "E" is in violation of article 1, section 10, clause 1 of the constitution of the United States, or the 14th amendment to said constitution, or of any part or provision of said constitution, or that it is in violation of the constitution of the state of California. By an order of the court pursuant to the stipulation of the parties this demurrer was made to stand as a demurrer to the amended and supplemental bill of complaint and the cause was submitted upon the demurrer.

**Ruling on Demurrer.**

The demurrer to that part of the bill in which the jurisdiction of the Circuit Court was put in issue was overruled and the demurrer sustained as to the other grounds therein contained.

**Scope of Opinion of the Court.**

The Circuit Court in its opinion upon the demurrer, after holding that there was no ground for contention against its jurisdiction, disposed of the case upon con-

sidering and answering three questions stated by it as follows [Trans. pp. 49-50]:

First. Did the laws of the state of California, at the time of the passage of the ordinances attached to the bill as exhibits "C" and "D," and here sought to be annulled, the former requiring telephone companies to report to the city council their receipts, expenditures and value of plant, and the latter fixing the rates to be charged by plaintiff for telephone service, confer upon the City of Los Angeles power to regulate charges for such service?

Second. Was such power, if the city possessed it, bargained away by the ordinance No. 6959, exhibit "B" to the bill, which granted to M. A. King, plaintiff's assignor, the franchise under which plaintiff is now operating?

Third. Do said ordinances exhibits "C" and "D," contravene that clause of section 10, Art. 1 of the constitution of the United States, which forbids any state to pass a law impairing the obligation of contracts, or those provisions of the fourteenth amendment to said constitution, which forbid a state to deprive any person of life, liberty or property without due process of law, or deny any person within its jurisdiction the equal protection of the laws?

The conclusions of the court as stated in its opinion [Trans. p. 74] are in the following language:

"My conclusions upon the whole case may be sum-
"marized as follows: The charter of the City of Los
"Angeles, at the time of the passage of the ordinances
"sought to be annulled, conferred upon said city power
"to regulate charges for telephone service, and said
"power was not surrendered or abridged by the grant of
"plaintiff's franchise, or otherwise, nor do said ordi-

"nances, or either of them, contravene any of the pro-"visions of the constitution of the United States."

**Decree.**

In accordance with the opinion of the court and its said rulings upon the demurrer, the court made its decree dismissing the bill upon the merits with costs, which decree was entered and recorded August 5th, 1907. [Trans. pp. 41-42.]

This appeal was thereupon duly perfected. [Trans. pp. 78-80.]

**Specifications of Particular Errors Relied Upon.**

The particular errors assigned in this court as grounds for the reversal of the decree, are founded upon assignments of errors in record, numbered I, II, III, V, VI, VII, VIII, IX, X, XII, XIII, XIV, XV and XVI [Tr. pp. 76-78], and said particular errors are now alleged as follows:

1. The court erred in holding that the second paragraph of section 9, ordinance "B" [Tr. p. 24], does not constitute or express a contract, fixing maximum rates chargeable by complainant for telephone service during the time of the franchise granted by said ordinance and mutually obligatory on plaintiff and defendant.

2. The court erred in ruling that the contract so evidenced is not impaired by ordinances "C," "D" and "F" of the City of Los Angeles [Tr. 26, 33, 36] in that said three ordinances undertake and assume to reduce the rates of compensation for the telephone service of com-

plainant below the rates established by the contract set forth in section 9 of ordinance "B."

3. Aside from said question of contract, the court erred in ruling that said ordinances "C," "D" and "F" do not violate the 14th amendment of the constitution, in that they were ordained without any provision for notice and hearing and without notice and hearing of the complainant, and for that reason undertake to deprive complainant, and do deprive complainant, of its property and of compensation for its services without due process of law.

4. That aside from said question of contract, the court erred in ruling that said ordinances "C," "D" and "F" do not violate the 14th amendment of the constitution in that they were ordained by a body, to wit, the mayor and council of the City of Los Angeles, which is not under the charter of said city a freely deliberative body or an impartial tribunal to exercise the power conferred by section 31 of the charter to fix rates of compensation for complainant's telephone service; and for that reason, said ordinances, in reducing rates for complainant's telephone service below that fixed in ordinance "B," undertake and assume to deprive complainant of its property and compensation without due process of law.

5. That the court erred in sustaining the first ground for the demurrer. [Trans. 34.]

6. That the court erred in sustaining the third ground of the demurrer. (*Ib.* 34.)

## POINTS AND AUTHORITIES.

### I.

### Jurisdiction.

So much of the demurrer as put in issue the jurisdiction of the Circuit Court, both on the ground that the bill did not disclose a ground of equitable cognizance, and on the ground that it involved no controversy arising under the constitution of the United States, was overruled by the court [see Trans., p. 40, par. 2 of demurrer]; [Trans. p. 42].

The appeal is taken directly to this court on the ground that the case involves the construction and application of the contract clause of the 14th amendment of the constitution and that the case is one in which certain ordinances of the City of Los Angeles, passed in exercise of general legislative power conferred, are claimed to be in contravention of the constitution because they impair the obligation of an alleged contract, and also because they undertake to deprive complainant of property rights without due process of law.

The jurisdiction of the Circuit Court, both as respects the federal question and the equitable jurisdiction is too well settled for controversy; so also is the jurisdiction of this court on appeal over the case because of the constitutional questions involved. We make no extensive citation of authorities, as we assume jurisdiction will not be questioned upon this appeal. We simply refer to a few of the later cases.

That a municipal ordinance passed under the supposed authority from the state, is within the prohibition of the federal constitution and void if it impairs the ob-

ligation of a contract, or assumes to work deprivation of any rights guaranteed by the 14th amendment of the constitution is settled.

*Northern Pac. Ry. Co. v. Minnesota,* 208 U. S. 583;

*Mercantile Trust etc. Co. v. Columbus,* 203 U. S. 311, 320, and cases cited;

*Davis & Farnum Mfg. Co. v. Los Angeles,* 189 U. S. 207, 216-217;

*St. Paul Gas Light Co. v. St. Paul,* 181 U. S. 142, 148, and cases there cited.

The Circuit Court had jurisdiction:

*City Ry. Co. v. Citizens Street R. Co.,* 166 U. S. 557;

*Ill. Cent. Ry. Co. v. Adams,* 180 U. S. 28, 35-37;

*Vicksburg Water Works v. Mayor, etc. of Vicksburg,* 185 U. S. 65, 82;

*Pacific Electric R. Co. v. Los Angeles,* 194 U. S. 112, 117-118;

*Knoxville Water Co. v. Knoxville,* 200 U. S. 22, 32;

*Mercantile Trust & D. Co. v. Columbus,* 203 U. S. 311, 320-22 *supra;*

*Northern Pac. Ry. Co. v. Minnesota,* 208 U. S. 583, *supra.*

The suit is of equitable cognizance:

*Smyth v. Ames,* 169 U. S. 466, 517-518;

*Detroit v. Detroit Citizens St. R. Co.,* 184 U. S. 368, 378-382;

*Cleveland v. Cleveland City R. Co.,* 194 U. S. 517, 530-531;

*Dobbins v. Los Angeles*, 195 U. S. 223, 241;
*Mercantile Trust & D. Co. v. Columbus*, 203 U. S. 311, *supra*.

The appeal lies direct to this court:

*Penn Mutual Life Ins. Co. v. City of Austin*, 168 U. S. 685, 684-695;
*Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1;
*Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 217, *supra*.
*Mercantile Trust & D. Co. v. Columbus*, 203 U. S. 311-320, *supra*.
*Northern Pac. Ry. Co. v. Minnesota*, 208 U. S. 583, *supra*.

On such an appeal the court has jurisdiction of the whole case:

*Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 217, *supra*, and cases cited.

## THE CASE ON THE MERITS.

II.

### Preliminary Remarks.

*The power of the City of Los Angeles, in granting the franchise in question, to enter into a contract with the grantee thereof as to rate for telephone service, first considered.*

The learned court below, while cursorily glancing in its opinion at the question of the authority of the City of Los Angeles to contract as to rates for telephone service when it granted the franchise by ordinance "B,"

and after intimating a doubt as to such power, said:

"For the purpose of this hearing, it will be conceded, "without further consideration, or any decision of the "question, that the city, when plaintiff's franchise was "granted, had authority by contract to abridge or aban- "don its control of telephone rates." [Trans. pp. 56-57.]

The court then passed on to a discussion of the general character of the power to regulate rates as fixing the rules of construction applicable to the terms of ordinance "B," on the question of whether such ordinance comprehended a contract respecting rates for telephone service, during the term of the franchise.

We venture to believe that the nature and scope of the power conferred upon a municipal body to grant a franchise, and the requirements prescribed to it in the exercise of such power, and the extent of its discretion, must have important bearing upon the construction of the terms of any grant of a franchise made by it, in respect of the question whether such terms embody a contract as to rates; and, that the safe and true method of approaching the solution of the question is to examine first the nature and scope of the power delegated to make the grant; the express requirements to be complied in making it, and the extent of the discretion left to the granting body.

We therefore proceed *in limine* to examine the statutory and charter provisions under which the franchise here under consideration was granted.

*As bearing upon the question of such power to contract, the Broughton Act of March 11, 1901, and the charter of the City of Los Angeles are to be regarded as concurrent laws.*

In the year 1893, the legislature of California enacted a statute providing a general scheme for the sale of franchises by the governing body of municipalities. (Stats. of 1893, p. 283.) This act was superseded by another in 1897 (Stats. 1897, p. 135); and again, in 1901, by what is commonly termed "The Broughton Act." (Stats. 1901, p. 265.) The last named act was in force when the franchise in question here was granted, and it is necessary to consider in detail the provisions of that act only.

The act of 1901 was, however, amended in 1903 (Stats. 1903, p. 90), and was finally revised in 1905. (Stats. 1905, p. 177.)

These acts, except that of 1903, are printed in the supplement at the pages shown in the index.

Co-existent with each of these statutes, were and are the provisions of the "Free-holders' Charter" of Los Angeles which are set out in the bill. [Trans. pp. 4-5.]

We submit that the statute of 1901 and the provisions of the charter are to be read together as bearing upon the power of the City of Los Angeles to grant a franchise for a telephone system, and to fix therein rates chargeable for telephone service during the term of the franchise; and ultimately in the light of such power as bearing on the question whether ordinance "B" embodies a contract as to rates.

*Los Angeles v. Davidson,* 150 Cal. 59, 63.

The act of 1901 was clearly intended to, and did, confer upon the municipalities of the state, the power to grant all franchises of the character therein described. Section 2 of the act provides that upon application being made for the grant of any such franchise, the governing body of the municipality "shall in its discretion advertise the franchise for sale."

That the granting of a franchise is a legislative act, is amply recognized by the decisions of the Supreme Court of California. It was so reiterated in a case arising under the said act of March 23, 1893, of which the Broughton Act of March 11, 1901, is a revision.

*People v. Contra Costa County*, 122 Cal. 421, 422, 423.

By the provision of section 2 of the Broughton Act just referred to, this legislative power of granting the franchises and privileges contemplated in the act, is committed to the discretion of the governing or legislative bodies of municipalities, subject only to certain requirements of the act, which by section 1 thereof are made conditions to the exercise of the power to grant.

Under the charter of the City of Los Angeles, the legislative power of the city is vested in the council, subject to the power of veto and approval by the mayor. [Trans. p. 4.] We shall, therefore, hereafter, for brevity refer to the legislative body of Los Angeles by the term "Council."

The statute does not purport to prescribe all the terms and conditions of the franchises which the council is empowered to grant under the act; it requires cer-

tain steps to be taken and certain things to be done, and others to be refrained from, and certain obligations to be imposed upon the grantees, all as the *sine qua non* to making the grant; all other terms and conditions are left to the discretion of the council; and this discretion, except in the particular respects prescribed by the statute, is the general and entire legislative discretion which is conferred on the council by the organic law of the city, which the constitution of the state of California declares the charter to be.

Cons. article XI, Sec. 8.

In this wise the statute takes account of the charter of the city; and, in passing judgment on what the council has done while the statute of 1901 was in force, in making any particular grant of a franchise, it is always to be remembered that the subject of making such grant was committed to the general legislative power of the council, modified only in the particulars expressed in the statute. Therefore, any terms and conditions in a grant, in addition to those prescribed in the act, rest upon a general legislative discretion of the council as the same is vested in it by the charter.

That this is the true relation of the statute to the charter is apparent not only from the fact that the act expressly commits the general subject of granting fran chises to the discretion of the council, but is confirmed, if confirmation were needed, by other provisions of the act.

The council is to determine the character of the franchise proposed to be granted. (Stat. Sec. 3.)

It must fix a term of the proposed franchise, but the duration of such term is left to its discretion. (*Ibid,* Sec. 3.)

It must take a bond conditioned for the performance of every "term and condition" of the matured franchise as granted; it will be noted that the bond is not simply to secure performance of the conditions imposed by the statute and referred to by that term in the closing sentence of section 1 of the act, but "each and every term "and condition" of the franchise. (*Ibid,* Sec. 7.)

Again, the prohibition contained in section 9 of the act, against the insertion of any clause or condition tending to restriction of free and open competition in the bidding, or to favoritism in bidding, implies that in contemplation of the act, the general power to prescribe in the grant all appropriate terms and conditions of the franchise, rested in the discretion of the council, subject only to the express requirements and prohibitions of the act.

Upon this question of power, then, to contract respecting rates of telephone service in granting a franchise to a telephone company, in view of the broad discretion conferred on the council, we submit that the burden is on those who deny that power, to point out where and by what it is excepted, or taken away, from the legislative discretion over the subject, expressly conferred upon the council.

Before proceeding to examine more critically the Broughton Act and the provisions of the charter, as bearing on this question, it seems appropriate to advert

briefly to the general principles, which may be stated as follows:

*In considering the question of such power to contract, the principle that the right to compensation is an inseparable incident to every franchise affected with a public use, is to be kept in view.*

The right to reasonable compensation is an essential and inseparable incident to the exercise of every franchise and privilege affected with a public use. As was said in *Stockton Gas, etc. Company v. San Joaquin County* (148 Cal. 313, 321), "the right to use the "streets and the right to take toll by reason of their "use, are *inseparable* parts of the franchise;" * * * "these rights *conjointly* constitute the franchise."

*Truckee & Tahoe Turnpike Road v. Campbell,* 44 Cal. 89, 90;

*State v. Boston C. & At. R. R.,* 25 Ver. 433;

*State v. Laclede Gas Light Co.,* 102 Mo. 472;

*Ibid on rehearing,* 15 S. W. 383;

*Los Angeles City Water Co. v. City of Los Angeles,* 88 Fed. 720, 731.

So vital is this right and so absolutely incident is it, that even when it is left to continuous public regulation, unrestrained by contract, it comes under the guaranty of the 14th amendment of the constitution of the United States.

*Smyth v. Ames,* 169 U. S. 466, 522-6, and cases there cited.

It follows that general power to grant a franchise to use the streets of a city in the construction and opera-

tion of a work of public utility, includes power, in the nature of legislative discretion, to make provision therein of a contractual nature, respecting the concomitant incident of compensation for services rendered under such franchise to the public.

This power is usually exercised by way of fixing maximum rates, to the end both that the operator of the franchise may be assured of reasonable compensation, and that the public may be protected against unreasonable charges, and that other conditions affecting rates, such for example as competition, may have their operation.

The power to agree upon maximum rates, is incident to the power to grant the franchise, even though the governmental power to regulate rates by enactments in the nature of laws, has not been conferred upon the municipality. So held in *City of Noblesville v. Noblesville Gas & Imp. Co.* (157 Ind. 162; 60 N. E. 1032, 1035). There the court in enforcing, in favor of the city, a stipulation in the grant of a franchise for the use of streets by a gas company, that the charges for gas furnished to the city and its inhabitants, should not exceed certain prices, said:

"That the city has no power to regulate the rates of "its licensee makes no difference. It has power to con- "tract; and the power to regulate as a governmental "function, and the power to contract for the same end, "are quite different things. One requires the consent "only of one body, the other the consent of two."

We submit that throughout the further discussion of the question of power of the city to enter into a contract respecting rates for telephone service, and in the

examination of the Broughton Act and the provisions of the city charter, the principle thus referred to should be kept steadily in view.

THE BROUGHTON ACT IS VITALLY RELATED TO THE POWER OF THE CITY TO CONTRACT RESPECTING TELEPHONE RATES, PRIMARILY BECAUSE IT REQUIRES THE FRANCHISE TO BE PUBLICLY SOLD BY THE CITY COUNCIL AND IN ITS DISCRETION.

We have here not merely the case of a naked power vested in the municipalities of the state to grant street franchises necessary to carry on a quasi-public service; but, the case of the conferring of such authority by the Broughton Act which contains much to show that it was enacted with specific reference to the power to make contractual provision respecting rates; that, in fact, the special conditions imposed by the act upon the grant of franchises, would fail of their purpose as respects the municipality, the purchaser and the public, if provision respecting compensation for the services under them were omitted from the grant, or if the municipality, in making the grant, should reserve the power at its pleasure, to subject the franchise to successive rate ordinances

The provisions of the statute to which we call attention in this connection are (Supplement, Act 1901):

1. The franchise proposed to be granted must be *sold* publicly to the highest cash bidder, under provisions which aim to secure the strongest competition. (Title of Act, and Secs. 2, 3, 5, 9.)

2. The proceeding to sell must be initiated by the

filing with the legislative body of the city, of an *application* by the person desiring to purchase. (*Ibid.* Sec. 2.)

3 Such legislative body thereupon exercises its legislative *discretion* upon such application. (*Ibid*, Sec. 2.)

4 If in the exercise of said discretion, it approves of the terms of the application, or causes them to be amended so as to meet its approval, it must then *"advertise the fact of said application"* by newspaper publication, in the manner provided in the statute, inviting sealed bids therefor. (*Ibid*, Sec. 2.)

5. Such application must state the *character* of the franchise or privilege proposed to be granted. (*Ibid*, Sec. 3.)

6. It must also state the *term* for which it is to be granted. (*Ibid*, Sec. 3.)

7. It must state that the successful bidder must, during the life of the franchise, except the first five years, *pay to the municipality two per cent of the gross annual receipts.* (*Ibid*, Sec. 3.)

8. The grantee must file a bond, running to the city, approved by its governing body, in a penal sum described and set forth in the advertisement, conditioned for the performance of "each and every term and con-"dition of such franchise." (*Ibid*, Sec. 9.)

*The procedure to sell, prescribed by the statute, is contractual at every stage:*

It is impossible to say that this statutory proceeding is not contractual at every stage.

a. *Because every franchise under the Broughton Act contemplates a new public utility.*

It is to be observed, in the first place, that in plain contemplation of the statute, the object of this proceeding on the part of the applicant, is to acquire the franchise necessary to the construction and operation of works constituting a *new* public utility, as for example a new telephone system; and, on the part of the city, to acquire for itself and its inhabitants the quasi-public service of the same *new* public utility.

The statute expressly excludes lines already doing an interstate business. (Sec. 1.)

The statute does not then contemplate the case of a system already constructed and dedicated to the public service, and which has already come under the rate-regulating power of the law-making body. It has in view the case of two contracting parties who are free to treat with each other as to a proposed enterprise of a quasi-public character, on the principles of contract throughout.

So far forth, the statute contemplates this precise feature of the creation of a *new* public utility through the medium of a contract, which was most ably discussed and emphasized in the opinion of the Circuit Court of Appeals of the 8th Circuit in *Omaha Water Co. v. City of Omaha* (147 Fed. 1, 5-6).

b. *Because the statutory application for a franchise may embrace a proposal as to rates.*

In the next place, the statute makes the application the foundation for the whole proceeding.

Can any provision of the statute or any principle of law, or any consideration of business likely to influence the conduct of such applicant, be suggested, that should forbid him from including in his application for the franchise, a term or provision as to the rates which he will be permitted to charge? Is he required on any possible grounds to separate from the franchise he proposes to buy, what is termed in *Stockton Gas etc. Co. v. San Joaquin County*, 148 Cal. 313, 321, *supra*, the inseparable and conjoint element of compensation for exercising it in the public service?

We submit that the statute contemplates no such requirement, but the very opposite.

c. *Because in exercising the discretion reposed in the council by the statute to pass on such application, the council is empowered to exercise its discretion on the rates proposed in it.*

As respects the city council when it exercises its legislative discretion, committed to it by the statute, upon the terms of the application, if it should conclude that it is for the interest of the city and its inhabitants to acquire the service of the new system of public utility, is it precluded by the statute from then considering the terms upon which it and the public may enjoy the same? Must it postpone the consideration of this matter until some future time or times?

Where is there any such requirement in constitution or statute? There is none. There is no constitutional or statutory requirement that rates must be fixed anew at intervals, or only after public service systems have

been installed, or that the legislative body of the city may not exercise this power to fix and determine rates, as soon as the exigency arises.

This exigency arises, we submit, as expressly contemplated by the statute, when the city legislature is framing, upon the basis of the application, its proposal to *sell* the franchise.

d. *Because the power to sell a franchise inevitably includes the power to prescribe maximum rates as a term of the franchise.*

No consideration can be urged to maintain that the statute requires that the council should advertise and sell a telephone franchise, for instance, divorced from all provision as to rates, and expressly or impliedly subject to such future ordinances "fixing and determining" the rates for services as the city council and mayor, or the voting population of the city under the initiative and referendum provisions of a free-holder's charter, should pass from time to time.

We are not required by the exigency of the argument to contend that the city council in its discretion, might not offer for sale a franchise, reserving to itself, or to legislation by popular vote under charter provisions, the question of what returns the purchaser of such a franchise should reap from his investment, dedicated to the public service; for the legislative discretion is unqualified, except so far as the act imposes express conditions.

But it is sufficient to this argument to say, that it is not to be assumed that the state legislature, in requiring the proceeding for the grant of a franchise to be ini-

tiated and consummated in a manner purely and mutually contractual, intended the absurdity of binding down the discretion which it expressly committed to the legislative body of the city, to compel it to make that contract lame, halting and one-sided, by excluding from it any provision as to rates for the public service to be made a duty thereunder.

And much less can there be attributed to the state legislature the intent that any municipality should keep Punic faith by withdrawing from the provision as to rates actually included in the very terms of the sale of the franchise, as the city in this case took steps to undertake to do, sharply upon the expiration of the three years within which the statute required the system to be completed, and within which it was completed, at the cost required by the ordinance, of not less than two hundred thousand dollars. [See ordinance "C," Trans. p. 26.]

One of the essentials, where competitive bidding is required, is that there be no uncertainty respecting the subject matter for which bids are invited. So frequently has this been held, that it seems scarcely necessary to more than state the proposition. The principle is illustrated by numerous decisions of the Supreme Court of California, in which contracts for public work have been held void because they reserved discretionary powers of some sort, to be exercised by municipal officers after the award of the contract, over the quality or character of the work made the subject of the public bidding.

*Bolton v. Gilleran*, 105 Cal. 244-251.

The court in that case quoted from *Foss v. Chicago*, 56 Ill. 358, with approval, the statement, among others, that such a discretionary power reserved over the subject of a contract "might be used as the instrument of "favoritism in letting contracts for the work."

So a franchise offered for sale, where the rates are to remain subject to be fixed from time to time by a common council, would involve fatal uncertainty, for the value of the privileges granted would be dependent upon the favor of future councils, and offer a premium to illegitimate political influence.

The act lays particular emphasis upon the securing of "free and open competition in bidding" for the franchise. (Sec. 9.)

It is inconceivable that the legislature intended that a franchise should be sold under conditions which should omit the most vital and important thing going to make up its value to the purchaser; or that public bidding should be invited under a power reserved, to destroy or largely impair that value by reducing rates.

Such a franchise would be of doubtful value in any market. The solicitude shown on the face of the statute, that the highest cash price be obtained for the franchise through "free and open competition in bidding" inevitably implies the power to make the thing to be sold, as definite and certain as due regard for its nature permits.

It is to be remarked here that the statute does not provide that a telephone or other franchise or privilege, sold under it, shall be exclusive. There is nothing in the statute that requires that such a franchise, employed in

any business, shall give to any one person or company a monopoly of that business within any municipality. Therefore the public always has the reserved power to make the maximum rates fixed in one grant of a telephone franchise, subject to being borne down by competitors to whom it has granted or may grant like franchises.

> *Long Island Water Supply Company v. Brooklyn*, 166 U. S. 685, 696, affirming *Re Brooklyn*, 143 N. Y. 596, 38 N. E. 983.

It is true that in the case of *California Reduction Company v. Sanitary Reduction Works*, 199 U. S. 306, which arises under the similar statute of March 23, 1893, this court, affirming the decrees of the Circuit Court and Circuit Court of Appeals, upheld the validity of the sale of an exclusive privilege or franchise granted by an ordinance of the legislative department of San Francisco for a period of fifty years, and in which rates of compensation were fixed for the term.

That case shows that although there was no express provision in that act or elsewhere which empowered the legislative body of the municipality to make its grant of franchise and privileges exclusive, the exercise of the legislative discretion of that body in doing so was sustained.

Since the scope of the legislative discretion was held to go to that extent, upon what ground, under this act, which is a revision of that, can the discretion of the legislative body of a municipality to fix maximum rates in selling or granting a telephone franchise, not exclusive, be denied?

e. *Because the discretion conferred by the Broughton Act on the council, to define the character of the franchise to be advertised for sale, includes the power to fix maximum rates or charges under the franchise.*

Again, the act requires, that after the legislative body has exercised its discretion upon the application to buy a franchise or privilege, and concludes to offer the same for sale, it must in the publication of the advertisement inviting bids, "state the character of the franchise pro-"posed to be granted." (Sec. 3.)

The *character* of the franchise then is a matter upon which the governing body of the city exercises its legislative discretion.

As illustrations of particulars in which it may do so, we may invoke features of the franchise now before the court. The ordinance "B" as a whole embodies the statement of the character of the franchise as advertised for sale. It contains a number of contractual provisions for the benefit of the city, which we shall discuss in detail later in this brief.

Would the city, respondent here, claim that there was no power to include these contractual provisions for its benefit in the description of the character of the franchise offered for sale and sold?

We may assume it would not. Doubtless power to include these and other matters relating to the character of the franchise, was committed to the discretion of the city council.

We submit that the Broughton Act empowers the legislative department of the city to decide in the broad

sense upon the character of the franchise; and that this power includes that of fixing maximum rates for the term of the franchise.

f. *Because the fact that the Broughton Act required the legislative body of the municipality to fix the term for which the proposed franchise is to be granted, and to state such term in the advertisement for bids, is consistent with the prescribing of maximum rates in the sale and grant of the franchise,—but inconsistent with any recognized principles for exercising continuing power by the city council to legislate as a political superior upon the rates from time to time during such term.*

The Broughton Act does not permit of perpetual franchises, but requires every franchise sold under it to be limited to a term.

The length of each such term is, as was said by this court in *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S., *supra*, at p. 317, "a matter in the wise "discretion of the board and determinable wholly upon "grounds of public policy." Over the honest exercise of that discretion as virtually there held by the court, the judiciary has no control; for it said that no consideration of public policy in the matter "can control the ac- "tion of the judiciary."

Since the term of the franchise must thus be limited, it follows that no matter how costly may be the plant or system of the franchise holder, which has been devoted to the public service thereunder, the expiration of the

period of the franchise, leaves the whole investment useless for the purpose for which it was made.

Whether the owner of the franchise would have the right to remove the materials that entered into the construction of the system, at the end of the term, where no provision on that subject is contained in the grant, we need not stop to inquire. Certainly they could not be, as fixtures, removed during the term,—for the duty and obligation to operate the franchise remains constant to the last moment of the term.

But if its right to remove such material does exist after the franchise ends, it would be in many cases of little value, and in some cases, as for example in removing underground conduits of a telephone system, more expensive than the value of the material recovered.

It may fairly be considered that the Broughton Act was passed in full view of the fact that the whole capital invested under such a franchise, would be virtually sunk during the term; and the legislature must have contemplated that this consideration must enter into the terms of the sale of the franchise.

But not only must the actual first cost of the construction of the system and of its extensions be practically sunk by the end of the term, but the cash price paid for the franchise must be entirely absorbed by the end of that period.

These considerations very properly enter into any agreement as to rates contained in the terms of the sale and grant of the franchise.

It is not apparent how ultimate compensation for either of these elements, of capital invested in or of the

cash price paid for, the franchise can be provided, as justice and equity require, otherwise than by such an agreement, fixing maximum rates for the term. It would seem that the system of continuous rate fixing is inadequate to that end. For it is now to be considered as the settled law, that all fixing of rates by governmental authority, acting purely in the law-making capacity, proceeds upon the legal basis of "a fair return "upon the reasonable value of the property at the time "it is being used for the public." This is the utmost the holder of a franchise can expect.

*San Diego Land & Town Co. v. National City,* 174 U. S. 739, 757;

*Smyth v. Ames,* 169 U. S. 466, 544, 546-7;

*San Diego Land & Town Co. v. Jasper,* 189 U. S. 439, 442;

*Redlands etc. Water Co. v. Redlands,* 121 Cal. 365;

*Spring Valley Water Works v. San Francisco,* 124 Fed. 574, 591.

See the summary by Mr. Justice Brewer of the present scope of the decisions of this court in respect to the power of the legislature in regulating rates, in *Cotting v. Goddard,* 183 U. S. 79, 86, 91.

Such legislative regulation of rates from time to time by the political superior, does not proceed upon the theory of providing for the return of any part of the principal of the investment; but at most, upon that of only yielding a limited rate of income upon the value of the investment. How can the fixing of rates which proceeds upon the basis of the reasonable value of the prop-

erty treated as a principal and a fair percentage of return thereon upon the standard of current rates of interest on money, take account of the facts that the franchise is not exclusive and is not perpetual?

Where the public seeks to condemn such a franchise and the physical property employed in its use, these facts are required to be taken into the account as having a downward bearing on the value. As was said in *Kennebec Water Dist. v. Waterville*, 97 Me. 201, 54 Atl. 12, 13, "It must be evident that the value of the plant and "franchise themselves, whether taken separately, or as "a whole, is affected by the character and duration of "the franchise." And citing:

*Bristol v. Bristol etc. Waterworks*, 19 R. I. 413; 34 Atl. 359;

*Re Brooklyn*, 143 N. Y. 596; 38 N. E. 983, *supra;*

*Long Island Water Supply Company v. Brooklyn*, 166 U. S. 685, *supra.*

Since in a condemnation proceeding the character and duration of the franchise is a necessary element in ascertaining the value of the property, it is somewhat difficult to see how these elements can be rejected in ascertaining the value of like property, as is required to be done to furnish the basis for fixing rates; yet the result would be most unjust.

It is obvious, that if in the exercise of the power to regulate rates, account be taken, in determining the value of the property devoted to the public service, of the facts, that the franchise is not exclusive and not perpetual, those facts must tend to reduce the estimate of that value and to depress the amount of net revenue to

be provided from the rates, with the effect of lowering the rates themselves.

But this must lead directly away from, and not toward making up to the holder and operator of the franchise, the loss of capital invested in buying the franchise and in constructing the system of works for exercising it, which must ensue at the close of the limited term; and would indeed make this impending loss an element to reduce net returns during the life of the franchise.

On the other hand, if the character of the franchise as being non-exclusive and its duration as being limited, are rejected from the valuation as a basis for fixing rates, then the governmental regulation would take no account of these elements, would make no provision for them, and would leave the purchaser to bear the loss at the close of the term without hope of escape.

These considerations, we submit, show that in prescribing the condition contained in the Broughton Act, that the franchise must be for a limited time, the legislature did not negative, but strongly assumed, that the municipal body had the power to contract respecting maximum rates for such term.

THE REQUIREMENT IN SEC. 3 OF THE BROUGHTON ACT, THAT THE SUCCESSFUL BIDDER AND HIS ASSIGNS MUST, DURING THE LIFE OF THE FRANCHISE, PAY TO THE MUNICIPALITY 2 PER CENT. OF THE GROSS ANNUAL RECEIPTS, SHOWS THAT SAID ACT CONTEMPLATES THAT TERMS OF SALE OF THE FRANCHISE MAY EMBRACE AN AGREEMENT AS TO RATES.

The Broughton Act expressly requires that an obligation on part of the purchaser of a franchise to pay two per cent. of the gross annual receipts from the operation of the franchise to the municipality, shall be made a condition of the sale (and the bond exacted secures the performance of this obligation).

This shows that in passing the law, the legislature had the matter of returns from the rates of charge for services in the business in which the franchise is employed, explicitly in mind.

In balancing considerations concerning such gross returns, which address themselves under this act to the discretion of the legislative body of a city in proposing the sale of a franchise, there are necessarily three points of view from which it must regard them, viz.:

a. As respects the municipal revenues to be derived from the business in which the franchise is employed.

b. As respects just compensation to the holder of the franchise for the public service in connection with it.

c. As respects the guarding of the municipality and the general public against undue charges for such service.

1. *Because the municipality is by the act made co-proprietor of all receipts from the rates, therefore it has a pecuniary interest in maintaining the stability of income therefrom, by fixing maximum rates; and the power to agree upon such rates in making sale of the franchise is therefore necessarily implied.*

That the municipality is required by the Broughton Act to become a co-owner in the gross earnings of the purchasers of telephone and other franchises and privileges thereunder, is indisputable.

We submit that it is a proper consideration in support of the authority of the legislative body of a city to agree upon maximum rates in making sale of a franchise, that the Broughton Act evinces solicitude on part of the state legislature, not only that the highest cash price should be obtained upon sale of a franchise, but also that municipal revenue should be derived by the appropriation of two per cent. of the gross earnings ever afterward during the life of the franchise.

The fact that it would not be to the pecuniary interest of the municipality to have such gross income subject to future reduction by successive rate ordinances, was one of the considerations necessarily submitted by the state legislature to the discretion given by section 2 of the Broughton Act to the city council, to pass upon the character of the franchise before offering it for sale.

The municipality therefore from the standpoint of conserving its own revenues, had the necessarily implied and strictly incidental power to fix maximum rates in the contract of sale. It has all of the inducement and motive so to do which acted upon the state legislature in pro-

viding this source of revenue and of a more personal, so to speak, and immediate and direct character.

This of itself, we submit, shows that the Broughton Act assumed the implied power in the legislative body of a municipality to agree upon maximum rates for the term of the franchise.

2. *Because of that requirement of the Broughton Act, there is necessarily assumed and implied the power to give to the vendee of the franchise such assurance of stable and reasonable returns, as a binding provision in the contract of sale for maximum rates affords.*

The purchaser under the act, of a franchise, must obligate himself and his assigns, to pay to the municipality two per cent. of the *gross* receipts, "during the life of "the franchise" (Sec. 2), and this payment is secured by the bond to be filed (Sec. 7).

As was pointed out by Mr. Justice Brewer, speaking for the court in *Chicago M. & St. P. R. R. Co. v. Tompkins,* 176 U. S. 167, 174, "the amount of gross receipts "from any business does not of itself determine whether "such business is profitable or not."

But the payment of this two per cent. of the gross receipts of the business in which any franchise sold under the Broughton Act is employed, is made mandatory in any event and at all events.

The question is liable to be raised, in the governmental fixing of rates, whether such an obligation to pay a percentage of gross revenue is to be treated in gross as part of the price paid for the franchise, and as included

in the principal of the investment, upon the estimated value of which, rates for net revenue are to be based; or, whether it is to be treated as belonging to current and operating expenses, and provided for in the rates accordingly.

The controversy sure to arise over the question must add that much to the embarrassment and uncertainty which attend the fixing of rates by governmental authority, and which renders the obtaining of judicial redress against rates unreasonably low, so exceedingly difficult.

It is a matter of calculation merely, to show that if the municipality, or its electorate, retains the right to regulate rates anew from time to time in its discretion, and since it must exact payment of this two per cent. of gross earnings into its treasury, and if it should be finally decided that it has no power and is under no duty to provide for returning it from year to year in rates, that such per cent of the gross receipts may easily absorb the whole net income and more.

It must always tend to this result as the operating expenses approach the gross revenue.

Rate fixing bodies rarely, if ever, aim to allow more than six per cent. net revenue on the value of the system and oftener much less. This was the rate adopted as the standard in *Spring Valley Water Works v. San Francisco*, 124 Fed. 574, *supra*.

Is it possible that the Broughton Act which required the municipal legislature to exact in the contract of sale of the franchise this covenant from the purchaser, to pay the municipality two per cent. on gross revenue,

denied to it the authority to permit the purchaser to protect himself against the chances of financial ruin, by an answering covenant for maximum rates?

We submit that the requirement of the one covenant from the purchaser, implies the authority to make the reciprocal covenant in his favor.

There is, we submit, no other way in which he can be justly or equitably protected.

Upon a survey of the whole scope of the Broughton Act, in view of the conditions made obligatory therein, viz.: The payment of the highest cash price obtainable for the franchise upon public competitive bidding; the obligation to promptly construct the works devoted to the public service in connection with the franchise and to operate them; the requirement, now under special discussion, to cover two per cent. of the gross income into the municipal treasury; the execution of a bond to perform each and every term and condition of the franchise, and in view of the further fact that the franchise is not exclusive, but the business in which it is employed is open to competition; and that the term is limited, we recur to the question, did the legislature intend that purchasers of franchises must by compulsion of the act, buy the franchises bare of any lawful agreement as to rates to be charged for services to the public?

We submit that it is not so.

3. *As the legislation of the state stands, there is no provision of law by which municipalities in general can guard themselves and their inhabitants against undue charges for telegraph and telephone service, except the power to agree upon maximum rates in the sale of franchises. This shows that it was not contemplated by the Broughton Act that such power was denied to any municipality.*

The Broughton Act being a general law, applies to all the municipalities of the state.

The state constitution (Sec. 6, Art. XI) contains the provision:

"Corporations for municipal purposes shall not be "created by special laws; but the legislature, by general "laws, shall provide for the incorporation, organization "and classification, in proportion to population of cities "and towns. * * *"

Pursuant to this provision, the legislature adopted the general municipal corporation bill, approved March 13th, 1883, entitled "an act to provide for the organization, "incorporation and government of municipal corpora-"tions," which provided for six classes of cities and towns.

Neither that act nor any other statute confers the power upon any class of municipal corporations, to exercise the governmental function of legislating upon telegraph or telephone rates. The state constitution (Sec. 33, Art. IV) contains the following:

"The legislature shall pass laws for the regulation "and limitation of the charges for service performed "and furnished by telegraph companies. * * *"

This provision includes telephone companies.

*Davis v. Pacific T. & T. Co.*, 127 Cal. 312;
1 *Joyce on Electric Law*, Sec. 8.

But the legislature has passed no law of the kind contemplated by the constitutional provision.

If under the said section 33, Art. IV of the constitution, it is competent for the state legislature to delegate this power to pass laws for the regulation and limitation of charges of telegraph and telephone companies to the municipalities, certain it is, under the decisions, that unless such authority is delegated to any given municipality by some law of the state, it cannot be exercised by it.

*Louisville Nat. Gas Co. v. State*, 1893, 135 Ind. 491; 34 N. E. 702, 703-4;
*Tacoma Gas & Electric Light Co. v. City of Tacoma*, 1896, 44 Pac. 655, 666;
*State v. City of Shoybogen*, 1901, 111 Wis. 23; 86 N. W. R. 657, 661-2;
*City of Noblesville v. Noblesville Co.*, 1901, 157 Ind. 162; 60 N. E. 1032, 1033-4;
*Mills v. Chicago*, 1904, 127 Fed. 731, 734;
*State v. Missouri & Kansas Telephone Co.*, 1905, 189 Mo. 83; 88 S. W. 41, 42-3.

Since then there is no general law of the state which delegates the governmental function of regulating telephone rates to municipalities; and since the state itself has not passed any law regulating such rates; and since the state does recognize the power of all its municipalities to sell street franchises to telephone companies; if the power to agree upon maximum rates as a

term of the sale were denied to such municipalities, then at least all of those organized under the general law, and all whose free-holders' charters do not assume to take over the power to regulate rates, would be powerless to guard themselves and their inhabitants against undue charges. That such a limitation upon rates by contract may be of value to the municipality and its public is illustrated in the case of *City of Noblesville v. Noblesville Co.*, 157 Ind. 162; 60 N. E. 1032, 1033-4, *supra;* and in *White Haven v. White Haven Water Co.* (Pa.), 58 Atl. 159.

This consideration shows that it was not the legislative intent that, under the Broughton Act, the power to agree upon maximum rates as a term of the sale of the franchise should be denied to the legislative body of any municipality.

*Every consideration shows that the Broughton Act conferred power upon the municipalities of the state to contract as to rates for telephone service.*

After this somewhat detailed examination of the Broughton Act, it is proper to make a more general survey of the statute, as bearing upon the authority of the council to contract as to telephone rates.

This proceeding does not contemplate merely and simply an *ex parte* grant of a privilege or franchise for the benefit of the grantee, but a proceeding wholly *mutual*, in which the city is bargaining for its corporate self and for its inhabitants to secure special advantages to result from the exercise of the franchise. Of course all quasi-public franchises are granted upon the principle

that some general advantage is to be gained for the public thereby. But under this act, full power is conferred on the municipal and legislative body to bargain in its discretion for any and all specific advantages deemed by it to be desirable for the city and its inhabitants, to be derived from the exercise of the franchise according to its nature; and the act goes further and requires that certain advantages to the city, other than the mere discharge of the public duty under the franchise, shall be so bargained for.

The capital thing which the city is empowered to stipulate for and acquire is a new public utility for itself and its inhabitants. But in connection with that, it is to share in the receipts from the exercise of the franchise; and it is left free in its discretion to exact other terms for the municipal benefit, as for example (anticipating the examination of ordinance "B"), provisions in aid of its fire and police establishments.

To say that a statute which expressly contemplates such free discretion in a city to give and take, to bargain and sell, and to contract in a bilateral way, does not confer the power to contract as to rates, seems to us, we submit with the greatest deference, would be peculiarly absurd.

About the power of the legislature to confer this authority, there can be no doubt. As was said by this court in *Detroit v. Detroit etc. Ry. Co.*, 184 U. S. 368, 382, citing numerous cases:

"But there can be no question in this court as to the "competency of a state legislature, unless prohibited by "constitutional provisions, to authorize a municipal cor- "poration to contract with a street railway company as

"to rates of fare, and so to bind, during a specific pe-
"riod in the future, a common council from altering or
"in any other way interfering with such contract."

To this same purport, see:

*Vicksburg v. Vicksburg Water Works Company,*
206 U. S. 495, 508.

That by the Broughton Act, it was also intended to authorize municipalities in California to contract as to rates is, upon all authorities, indubitable. In what essential respect does the power given by that act to municipalities, respecting street railway and telephone companies, differ in respect to the power to agree upon rates, from that "to provide for the creation and maintenance "of a system of water works, and to that end to contract "with a party or parties who shall build and operate "water works," conferred by the act considered in *Vicksburg v. Vicksburg Water Works Company, supra,* 206 U. S. 497; or from that "to make by-laws or prices "* * * to make regulations to extinguish fires * * * "to provide for supplying the city with water," considered in the California case of *Los Angeles v. Los Angeles City Water Company,* 177 U. S. 558, 570, and in same case below in 88 Fed. 720, 730-1; or, from that "to "grant the right to use the *streets for the purpose of "laying* * * * *pipes* to furnish inhabitants of a city "with light or water," and *"to authorize the erection of"* water works, "for the purpose of furnishing a city or its "inhabitants with a sufficient supply of water," considered in *Walla Walla v. Walla Walla Water Company,* 172 U. S. 1, 3, 14; or, from the statutory power "to "contract with the street railway companies in respect

"to the terms and conditions upon which (street) rail-"ways may be constructed, extended and consolidated," considered in *Cleveland v. Cleveland R. Co.*, 194 U. S. 517, 533-534; and in *Cleveland v. Cleveland E. R. Co.*, 201 U. S. 529, 540-1; or, from the power "to construct "water works on such terms and under such regulations "as may be agreed on," considered in *Omaha Water Company v. City of Omaha*, 147 Fed. 1, 5, 12, 13; or, from the legislative authority "to provide for the ex-"tinguishment of fires and to supply the town with fresh "water," considered in another California case of *Santa Ana Water Company v. Town of San Buena Ventura*, 56 Fed. 339; or from the power derived by the city of St. Louis from its general capacity to contract for lighting the city, as was held in *State v. Laclede Gas Light Co.*, 102 Mo. 485, 14 S. W. 974. Or taking the Broughton Act in connection with the city charter, in what material respects does the legislative authority, considered in the *City of Bessemer v. Bessemer Water Works*, Ala. 1907; 40 So. 662, differ from that of the city here, as respects the power to agree upon rates?

The above cited cases all involve rates, except the Walla Walla case, which involved the question as to the legislative authority to grant the exclusive right for a period to supply water to the City of Walla Walla; but the case is aptly cited to show the scope of power embraced within the general terms of authority to provide for furnishing a city with water, or any other public utility.

In each of the other cases above cited, it was decided that the respective statutes involved, authorized the mu-

nicipalities to contract as to rates; and the emphatic declaration in the Cleveland case, that the statutory power above quoted "to fix terms and conditions" of a franchise for the operation of a public utility, embraced "comprehensive power to contract" with the grantee of such franchise, deserves to be carefully noted.

*Cleveland v. Cleveland Ry. Co.*, 194 U. S. 517, 532-34.

We respectfully submit that the Broughton Act, considered in all its features, more specifically contemplates and more inevitably involves authority to municipalities to contract, than does any statute considered in either of those cases; for in none of them was the franchise required to be sold to the highest bidder; and in none of them was the purchaser required to share with the municipality the gross earnings from the business in which the franchise was to be employed.

The legislature could not have been unmindful of the fact that the purchaser of the franchise must need such a degree of assurance and certainty of income, as a contract for maximum rates, might afford under conditions where the business itself must remain open to competition.

These very considerations were, in fact, invoked by the Circuit Court of Appeals, for the Eighth Circuit, in its recent decision of the Omaha Waterworks case, as persuasive of a legislative intent to confer the power to contract as to rates, the court saying:

"The main purposes of city waterworks is the revenue "derived from private consumers of water. The rates "which they pay absolutely determine the financial suc-

"cess or failure of a city water company's enterprise. "The term or regulation in a contract for the construc- "tion and operation of waterworks, which more than any "other conditions the nature and the prospect of the un- "dertaking is that which fixes the rates which the owner "may collect of private consumers. These are matters "of common knowledge. The members of the legisla- "ture could not have been ignorant of them when they "granted to this city the power to agree upon terms and "regulations upon which the works should be built and "operated, and it is incredible that they intended to ex- "cept from this general grant the authority to agree "upon the cardinal term which alone conditions the suc- "cess of the entire undertaking."

*Omaha Water Co. v. City of Omaha,* 147 Fed. 1, 13.

So the Supreme Court of Alabama, in a very recent decision, sustaining a similar municipal contract fixing water rates, under a charter authorizing provision, "by "contract, ownership of waterworks, or otherwise," for the supply of the city and the citizens thereof with water, and the *regulating* of "rates to be charged therefor to "the city and to private citizens and consumers," had recourse to the same argument, saying:

"To assume that the legislature, in making this grant "of power, intended to withhold authority to fix the "rates, would be to impute to the lawmakers ignorance "of the essential elements of a contract. How could it "be expected that the city could procure any person, "firm or corporation to embark with money, time, and "skill in an enterprise ample to accomodate the public "necessities upon an uncertain stipulation as to what "the remuneration would be? Is it not more rational, "and more in keeping with business principles, to say "that the legislature necessarily intended, by the grant, "to confer on the city authority to award privileges "such as would justify some responsible person, firm, or

"corporation in the expenditure of so large a sum of "money? And why is not the privilege to charge not "exceeding a fixed rate during the life of the contract "one of the 'needful provisions' and within the legisla- "tive intention?"

The court then quoted and adopted the language which we have above quoted from the opinion in the Omaha case, 147 Fed. 1, 13.

*City of Bessemer v. Bessemer Waterworks,* — Ala. —; 44 So. 663, 668.

**The City Charter.**

*The city charter concurs with the Broughton Act in conferring power upon the City of Los Angeles to contract as to rates in the sale of a franchise.*

The charter of the City of Los Angeles was framed by a board of freeholders and adopted by the vote of the electors of the city, approved by the legislature of the state, under the express sanction of Sec. 8, Art. II of the state constitution, which declares a charter so adopted by any city to be its *organic* law. In considering the provisions of this "freeholders' charter," this fact as pointed out by the court below is to be remembered.

We adopt as our own the views expressed in the learned opinion of the Circuit Court on this point, as set forth in the transcript in the last three paragraphs of page 54 and the first two paragraphs of page 55.

See *St. Louis v. W. U. Tel. Co.*, 149 U. S. 465, 467-9, holding that such an organic law is to be construed as organic acts are construed.

The provisions of the charter of the City of Los Angeles, relative to the powers of the city and its council,

so far as is material to the question of the power to contract as to rates, are set forth in the bill. [Trans. pp. 4-5.]

Section 31 of the charter contains the provisions most directly applicable to the matter in hand [Trans. p. 5]; and, after eliminating the portions not strictly pertinent to the question, it reads:

"The council shall have power by ordinance to *regu-*
"*late* telephone *service* and the use of telephones within
"the city, and to *fix and determine the charges* for tele-
"phones and telephone service and connections. * * *"

That the terms of the power thus conferred, as well as the other provisions of this organic law, are to be given a comprehensive and inclusive, rather than a strict and narrow interpretation, is indeed expressly enjoined by section 23 of the charter itself, which provides that the municipality "shall have power * * * to exercise all "municipal powers necessary to the complete manage-"ment and control of the municipal government, *wheth-*"*er such powers are expressly enumerated herein or not*, "except such powers as are forbidden *or are controlled* "*by general law.*" This shows that, except so far as the Broughton Act imposes express conditions, the "discre-"tion" of the city council, to which section 2 of that act commits the whole subject of telephone franchises and service, is as ample and comprehensive as words can make it.

It is a fundamental—an *organic*—power.

*St. Louis v. W. U. Tel. Co.*, 149 U. S. 465, 467-9, *supra*, .

and the Broughton Act invokes this power and concurs with it.

*The charter expressly confers the power to fix and determine rates for a definite period.*

The authority to fix rates contractual for a determinate period is we therefore submit, clearly given by the express terms of the charter. By one clause of section 31, the city council is declared to be invested with power "to regulate telephone *service* and the *use* of tele-"phones within the city;" and in the next succeeding clause of the same sentence, to be invested with the power to "*fix and determine* the *charges*" "for tele-"phones and telephone service and connections." Thus the charter emphasizes the authority to fix and determine charges for telephone service by detaching, and so contra-distinguishing it from the power to regulate the service and use. This power to regulate, comprehends the strictly continuing police powers over the subject of telephone service and use. The term "regulate," however, is not used in connection with "charges;" but the words, "fix and determine" is the language employed. This phrase carries with it the idea of greater permanence and stability. The converse of the maxim, *noscitur a sociis*, applies. Clearly it comprehends more than the police range of power. It unquestionably embraces the power to contract for a definite period. (See as to the significance of the term "Regulate," Vol. 7, WORDS AND PHRASES JUDICIALLY DEFINED, p. 641; and as to the term, "Fix," Vol. 3 of the same work, p. 829.)

*Detroit v. Citizens Street R. Co.*, 184 U. S. 368, pp. 383-385, 397.

It may be said here, as was said in that case at page 397, that "the right from time to time to make such fur-"ther rules, orders or regulations, as to the common "council may seem proper, cannot be held to extend to "the alteration of a contract as to the rate of fare which "shall be charged" * * * but the power to *regulate,* given in the charter, relates to the purely police power, or to the *service*, and not to the rates.

*The charter puts no limitation upon the period for which the council is so empowered to fix and determine telephone rates.*

The period for which the council may then "fix and "determine" charges is not limited to a year, or to any specified length of time. It is clearly left to the discretion of the council itself to determine the period during which rates, once fixed and determined, shall continue.

It is important and significant to contrast the terms in which the power of fixing rates is conferred in the charter, with the terms employed in the constitution of the state, conferring on municipalities the authority to fix water rates.

The words of the latter provision are, "That the rates "or compensation to be collected * * * for the use "of water supplied to any city, * * * or inhabitants "thereof, shall be fixed *annually* by the * * * gov-"erning body of such city * * *" and shall "*continue "in force for one year* and no longer."

Cons. Cal., Art. XIV, Sec. 1.

This provision of the constitution had been in force for ten years prior to the adoption of the freeholders'

charter of the defendant city, and since the said constitutional provision requires the city council to fix water rates in February of each year, it is fair to presume that the city had exercised the power thereby conferred. (See *L. A. City Water Co. v. Los Angeles*, 177 U. S., p. 578.)

At all events, the terms of this constitutional provision for the fixing of water rates must have been well known to the framers of the city charter; and the contrast by omission to designate in that instrument any limitation as to the period for which telephone rates might be fixed, is a circumstance that cannot be ignored in determining the effect of the terms employed.

Appellee's counsel, we anticipate, will contend that these charter provisions were intended to confer only the power to make regulations of charges which should be continuously subject to alteration by subsequent regulations, and not a power to fix charges for a determinate period.

We have already pointed to the appropriateness of the terms used, viz.: "to *fix and determine* the charges," to confer authority to establish rates for a definite period of time; and we submit that this is of itself an adequate answer to the position assumed by the appellee. Besides which, we have all the other pertinent considerations hereinbefore and hereinafter discussed.

*The fixing and determining of rates for a definite period is neither an abandonment or a suspension of the power to regulate by the exercise of it.*

It should also be observed that there is no inconsistency between the power of continuing regulation,

and the power to fix rates for a determinate period. Necessarily, under the settled doctrine of this court, both powers co-exist in every state legislature, unless inhibited by the terms of the local constitution, and both may competently be delegated to municipal authorities.

This point was raised, and expressly ruled in accordance with our contention, by the Supreme Court of Alabama in the recent decision of that court above cited. The charter power in question there conferred express authority to make provision for a water supply "by contract, or otherwise," and to "regulate and prescribe" charges therefor. In holding, as above indicated, that the express grant of authority to regulate rates did not exclude the power to contract for maximum rates, the court pertinently declared: "If the power is conferred "on it to express in the contract maximum rates, *by "making the contract, the rates are regulated.*"

*Bessemer v. Bessemer Waterworks,* — Ala. —; 44 So. 663 (p. 668).

The declaration and application of the same principle, namely, that the fixing of rates by a contract is an exercise of the power of regulation,—by the Supreme Court of Mississippi (in *Stone v. Yazoo etc. R. Co.,* 62 Miss. 607) was cited with approval by this court in

*Vicksburg v. Vicksburg Waterworks Co., supra.* 206 U. S., p. 510.

The same conception found expression also in the recent decision of this court in which it was held that the granting by the supervisors of San Francisco, of an exclusive privilege, or contract, for the period of fifty

years, for the disposal of garbage, etc., was sustainable as an exercise of the power of making "police and sani- "tary regulations" conferred on the municipality by the constitution of California.

*Cal. Red. Wks. v. Sanitary Red. Wks.*, 199 U. S. 306.

The point made by the decisions last cited deserves emphasis. A contract by which the rates to be charged for the services of a public utility are fixed for a determinate period, is sometimes spoken of as an abandonment, or a "bartering away" of the power of regulation; and some supposed objection to the exercise of the p[illegible]r is borrowed from this conception of it. But this view is only half true, and, therefore, like other half truths, misleading, and at bottom false. The true conception of such a contract is that expressed in the decisions last mentioned, namely, that the fixing of rates for a prescribed period (whether by contract or otherwise), is an *exercise* of the power of *regulation*, and not an abandonment of it. And the assumption that there is something obnoxious in this particular mode of exercising the power must give way when it is borne in mind that the municipality may at any time reassert its power of regulation by simply first condemning the contract, or franchise, right to fix rates.

*The City of Los Angeles is required by its charter to provide for "maintaining fire alarm and police telegraph systems" and it may contract to that end.*

Among the duties made mandatory upon the city council by section 33 of the charter [Trans. p. 8] is to

"provide for maintaining *a fire alarm and police tele-*
*"graph* system."

It will be observed that in ordinance "B," the practical construction of the term "telegraph system" in this section is "telephone system," which accords with the legal construction put upon the term in California by the decision above cited, and by other authority.

Certainly nothing in a city government is more closely related to the safety and peace of the city than its fire and police departments. Under all of the decisions, this mandatory duty to provide for them, carries with it the implied power to employ contractual methods to acquire for the city the advantages of telephone facilities for its fire alarm and police systems.

*The telephone service, for which the charter gives power to fix and determine charges comprehends that service for the fire and police departments; and for the same, charges may, in virtue of such power, be fixed and determined by agreement.*

We maintain that the power given in section 31 of the charter, *ubi supra, "to fix and determine the charges for "telegraph and telephone service,"* comprehends the service to the city itself, as well as to its inhabitants; and that such telephone service to the city itself is as much an integral part of the whole duty of the system, as is the rest of its service, to the individual inhabitants of the city.

But would the power to "fix and determine charges" as a purely law-making power, justify any attempt by the city to compel a telephone company to furnish this

service for nothing, or for any reduced or special rates? No one would so contend.

It may be safely said that if the matter of obtaining this exceedingly important telephone service to the city, had been left out of the domain of contract, the law-making body of the city would have been powerless to secure the service on any more favorable terms, than any private individual or corporation. Compulsory discrimination the 14th amendment would not tolerate.

Will any one say, then, that the city has no power to contract respecting the charges for this part of the service of the telephone system, but that it must act in the premises solely as a political superior—a law-making body? No one would so contend.

*But the power to fix and determine charges is an entirety; and if it may be exercised contractually in behalf of the city, it may be so exercised in behalf of its inhabitants.*

But if there exists the power in the city, under this authority, to fix and determine charges to contract for itself, by what reasoning can it not exercise the same power to contract for its inhabitants by way of agreement, fixing maximum rates?

The power as to the city and its inhabitants is not subdivided into two separate and distinct powers, one of which may be exercised contractually and the other of which must be exercised governmentally. It is one and the same power, and it is a plenary power to contract.

*This power to contract is properly exercised by ordinance.*

The learned opinion of the court below attaches some importance to the circumstance that the powers conferred by the section of the charter immediately in question (section 31), are required to be exercised by ordinance, as indicating a legislative, rather than a contractual, power. And reference is made to section 12 of the charter, which requires "all legislative power" to be exercised by ordinance; but permits "other action of the "council" to be "by order upon motion."

But the real purpose in requiring the powers conferred by section 31 to be exercised by ordinance, is to be found in the provisions of section 37, which subject all *ordinances* to the veto of the mayor, to which, of course, other action of the council is not subject. The variety of action which might appropriately be accomplished by ordinance, in the estimation of the framers of the charter, may be seen from the provisions of section 16, which declare that "*no ordinance* shall be passed, or "other act done, *granting a franchise, making any con-* "*tract*, auditing any bill, ordering any work to be done, "or supplies to be furnished, disposing of or leasing the "city property, ordering any assessment for street im- "provement, or building sewers, or any other act to be "done, involving the payment of money, or the incur- "ring of debt by the city, unless two-thirds of the mem- "bers of the whole council vote in favor thereof. All "*other ordinances* may be passed by a vote of a majority "of the whole council."

The practice of granting franchises by ordinance has

been well nigh universal with American municipalities. Indeed, the Broughton Act, as amended in 1903 and revised in 1905, expressly requires the granting of franchises, pursuant to sales made, to be by ordinance. (See Appendix, Acts 1905, p. 777, section 7.)

*Los Angeles v. Davidson*, 150 Cal. 59, 60.

The practice of entering into contract by legislative acts is too well settled, since the Dartmouth College case, and is too plainly contemplated by this charter itself to justify any further elaboration upon the subject.

The drafters of the appellee's charter doubtless had this general practice in mind when they adopted the terms of sections 16 and 31 of article III.

*McQuillan on Municipal Ordinances*, Sec. 6.

*The power to fix and determine maximum rates by contract was contemplated in framing the charter, as a means for inducing the construction of a competing telephone system in the City of Los Angeles, and to this end the Broughton Act contributes.*

The bill shows [Trans. p. 17] that when the city charter of Los Angeles was adopted, a corporation known as the Sunset Telephone Company had the monopoly of the telephone business in that city. That said company was established throughout the state of California, and was doing an interstate, as well as a local business when the city charter was adopted and the Broughton Act was passed, we think is a fact of such public notoriety that judicial notice may be taken of it.

This was indeed the telephone system "doing an in-"terstate business," referred to in section 1 of the

Broughton Act, of which the legislature took notice in the act.

The all but inevitable fruit of any monopoly is inadequate, inferior and unsatisfactory service, as well as excessive charges. This has been the common experience of American municipalities, and of European as well.

The only practical and effectual curb of the monopolistic tendency to inferior and defective service is competition, or the fear of it. To no public utility are these observations more applicable than to the telephone, where the efficiency of service so largely depends upon readiness in utilizing improved methods and appliances, and upon the personal qualities of promptness, attention and courtesy on the part of the operators.

These facts of common experience were well known to the people of the city when they framed its charter, and to the legislators of the state when they approved it. The purpose of the charter grant of power, evinced by the comprehensive terms in which it is couched, was to enable the city to procure for its inhabitants, so far as legislation could compass it, not only economical, but efficient, service. The power expressly conferred related both to the fixing of charges and to the regulation of telephone service generally.

It cannot well be doubted that the franchising of a competitive telephone system was contemplated by the framers of this charter power (as unquestionably such competing systems were contemplated by the Broughton Act), as a probable recourse in order to the effective regulation of telephone service within the city, and that, as a necessary inducement to the invest-

ment of capital in the construction of such a system, an agreement as to the rates which might be charged for its services, was anticipated as a probable term of the franchise. The express authority "to fix and deter "mine charges" must, therefore, be construed as having been conferred in contemplation of this contingency.

That in order to induce capital to invest in the inauguration of a public utility enterprise, it is usually necessary to offer the inducement of a fixed limit on legislative regulation of rates, is shown by the decisions of this court, and other courts, which we cite herein. Yet these decisions, in every instance, dealt with the case of an enterprise enjoying, or expected to enjoy, a practical monopoly; whereas here the object of statute and charter is to prepare the way for competitive enterprise.

Obviously, the vital importance to the franchise holder of an assured right of fixing charges (within reasonable, prescribed limits), is greatly increased when the proposed enterprise is not the first, or only, institution of its kind in the field, but must from its inception struggle against the competition of an established rival. Such competition inevitably adds another feature of dangerous uncertainty as to profits, and renders protection against legislative interference with rates so much the more necessary, in order that capital may be induced to enter the field of competition.

Therefore, in order to enable the City of Los Angeles to induce capital to embark on a competing telephone enterprise, it was at least as requisite that it should take to itself in its charter, freedom to make contracts, fixing maximum rates for telephone service, as in the opinion

of the courts in the cases cited, it was deemed requisite by the several legislatures to confer such power upon municipalities in the case of water, gas and street railway companies.

That this power was employed by the appellee city to this very end, will be shown when we come to consider the contract evidenced by said ordinance "B."

A very strong argument, showing that the provision in the city charter, giving the city power to fix and determine rates, is a contractual power, is the consideration hereafter discussed; that if section 31 was meant to be a *rate-regulating* provision, rather than a contractual power, it would be unconstitutional as denying due process of law, because it provides for no notice, nor for a hearing before an impartial tribunal.

Before taking up the consideration of said ordinance, we add, under the next succeeding heading, a collection of citations in support of this conclusion; and after that, under an appropriate heading, observations upon the contemporaneous construction of the Broughton Act and city charter.

**In California the right of a municipality to make a contract for a term of years, controlling the further exercise of legislative or governmental power over its subject matter during such term, is judicially established.**

In McBean v. City of Fresno, 112 Cal., the Supreme Court said at p. 161:

"The City of Fresno duly and regularly, so far as "form and procedure are concerned, entered into a con- "tract with plaintiff by which plaintiff agreed to take "care and dispose of the sewage of the city for the period

"of five years for the sum of $4900 per annum, payable "quarterly."

At p. 163, the court said:

"But the controlling questions presented by this court "for determination are: (1) Does it violate the con- "stitution or the charter of the city of Fresno? (2) "Does it operate as a surrender or suspension of the leg- "islative powers of the trustees of the city?"

The court holds the contract does not violate the constitution or the charter, and then adds, at page 169, the following:

"Upon the second proposition, viz., whether or not the "contract operates as a surrender or suspension of the "legislative powers of the trustees of the city, it is to be "observed that there is in this state no inhibition against "the making of a contract by a municipal board which "shall extend for more than one year, or even beyond the "term of office of the board which makes it. If the legis- "lature desired to restrict municipalities in this particu- "lar, it could easily do so by the passage of a law such as "exists in some other states, declaring void any contract "upon the part of a municipality which is to extend be- "yond the current fiscal year or beyond the term of office "of the authorities which enter into it."

* * * * * * * *

"In San Francisco Gas Light Company v. Dunn, 62 "Cal. 585, this court says: 'In the absence of express " 'limitation as to the period of time for which a contract " 'may be made, we would hold, perhaps, that the con- " 'tract with the plaintiff for five years was not beyond " 'the power of the supervisors.' In Riehl v. San Jose, "101 Cal. 442, an action was brought to set aside the "contract for five years made by the city with an electric "company for the lighting of its streets. The complaint "sounded in fraud, and further declared that the contract "was against public policy, illegal and void. The con- "tract was upheld, it being found that there was no "fraud, 'that the members of the common council acted

" 'as honest men, and exercised their honest discretion in
" 'the best interests of the city.' "

In Contra Costa Water Company v. Breed, 139 Cal. 432, the Supreme Court was considering the validity of a contract by a municipality to purchase water from a water company, and the court said at page 439:

"In the second place there were no 'restrictions im-
" 'posed' by the charter, absolutely prohibiting the ac-
"tion of the city council here involved."

In the case of Dolan v. Clark, 143 Cal. 176, the Supreme Court was considering the validity of a contract made by the City of Sacramento to construct and operate a fire alarm system running for a term of five years, and at page 181 it said:

"The city had the right to make contracts if otherwise
"unobjectionable, to continue for five years, and to pro-
"vide for payments thereunder at different times. * * *
"We might therefore rest this decision upon the ground
"that the law presumes all contracts to be fair, reason-
"able and to be made by proper authority."

In Los Angeles Water Company v. City of Los Angeles, 88 Fed. 720, the Circuit Court was considering the power of the City of Los Angeles to contract, fixing for term of years the rates of charge for supplying water to the inhabitants of the city, and the court said at page 730:

"The grant of an exclusive franchise is not an indis-
"pensable, or even appropriate, means to the procure-
"ment of water, and, besides, creates a monopoly (and
"it is upon these grounds that many of the decisions
"holding such grants inoperative are rested); *while an*
*"agreement fixing the price to be paid for water does not*
*"destroy nor is it inimical to competition, and is both ap-*

*"propriate and indispensable to a reasonable and con-*
*"venient exercise of the general power to supply water.*
*"In procuring water, or any other commodity, by pur-*
*"chase, one of the first things to be considered and agreed*
*"upon is the matter of price. Therefore, to hold that gen-*
*"eral power, without limitation, in a municipal corpora-*
*"tion, to supply the city with water, does not include*
*"power to agree upon price, it seems to me, would be a*
*"solecism.*

* * * * * * * *

"The words of the grant in the case at bar, 'power
"'* * * to provide for supplying the city with water,'
"are clear and unambiguous, and, in my opinion, admit
"of no other reasonable construction than that they were
"intended to confer upon the City of Los Angeles, so far
"as concerns the means necessary to supply the city with
"water, power, as ample as the legislature itself pos-
"sessed."

That case was before this court and decided and reported in 177 U. S. 558.

Another case of local import is that of Santa Ana Water Co. v. Town of San Buena Ventura, 56 Fed. 339.

There the board of trustees had power to make regulations concerning the health, cleanliness and good order of the town, "to provide for the extinguishment of fires, "and supply the town with fresh water." They granted a franchise for fifty years to supply the city with water, giving the grantees "the unrestrained right to establish "such rates for the supplying of water to private persons "as they may deem expedient, provided that such rates "are general."

The Circuit Court, Judge Ross presiding, held this to be a contract as to rates which could not be impaired by the state, by the subsequent adoption of a constitution authorizing cities to regulate the price of water; and

this decision was relied upon as authority in the Los Angeles Water Company case, *supra.*

In these water rate cases, the cities had power to provide for a water supply. In the case at bar, the city was given the power to provide a competing telephone system by sale of a franchise. Which is the greater power?

| THE WATER CASES: | THE TELEPHONE CASE: |
| --- | --- |
| The city with power to supply its inhabitants with water, granted a franchise fixing rates. | The city, with power to provide for a competing telephone system for itself and its inhabitants, sold and granted a franchise fixing rates. |

"Write them together, yours is as fair a name!
Sound them, it doth become the mouth as well;
Weigh them, it is as heavy, conjure with 'em,
'Brutus' will start a spirit as soon as 'Caesar.' "

We paraphrase the language of the court in the Los Angeles water rate case and apply it here, thus:

An agreement fixing the price to be paid for telephone service does not destroy, nor is it inimical to competition; and is both appropriate and indispensable to a reasonable and convenient exercise of the general power to sell and grant a telephone franchise. In procuring telephone service, or any other commodity by sale of the right to supply such service or commodity, one of the first things to be considered and agreed upon is the matter of price of service. Therefore to hold that the general power without limitation in a municipal corporation to sell and grant a telephone franchise for the purpose of securing

telephone service does not include power to agree upon price, would be a solecism.

It would be an absurdity to say that where a city had power to supply a commodity to its inhabitants it could grant a franchise fixing rates, but that it couldn't grant a franchise fixing rates where it was expressly authorized to grant a franchise to a party to supply that commodity.

The above case in 56 Fed. was decided in May, 1893, and the one in 88 Fed. in May, 1898. These cases should have great weight in determining what the rule of decision was when this franchise was granted in 1901.

### The Contemporaneous Construction of the Broughton Act and of the Powers of the City Under Its Charter Are Controlling.

The bill of complaint in paragraph IX [Tr. pp. 8, 9] sets forth the contemporaneous construction of the powers of the appellee city and municipalities generally throughout the state, and among the things the bill shows that there have been issued since March 11th, 1901, in California, a great many franchises for telephone plants; that each and every franchise so granted by such municipality specifies the maximum rate as in exhibit "B" to be charged by such company for services rendered in pursuance of said franchise. And the bill shows that the city has sold many franchises since the passage of the Broughton Act and its predecessors, and that the cities and municipalities in the state of California have followed the Broughton Act in the disposition of franchises.

The charter of the city of Los Angeles was adopted in 1888. At that time the city had a telephone plant rendering very inadequate service, and the rates charged by such telephone plant were in excess of those fixed in the franchise of the complainant, and no attempt was ever made to regulate rates notwithstanding this provision in the charter, until the complainant had complied with the terms of the franchise by expending the money required by the terms thereof. The only attempt the city had made looking to the fixing of rates was the fixing of rates in the charter of complainant. Thus we claim that the city itself construed its powers under the Broughton Act and under its charter to be a power to contract fixing rates and not simply to regulate the rates from time to time. Indeed, it is very questionable, as will be seen hereafter in this brief, whether section 31 is constitutional construed in any other sense than that of giving the municipality power to contract.

In the case of *Railroad Commissioners v. Market Street Railway Company*, 132 Cal. 677, p. 680, the Supreme Court applied the doctrine of contemporaneous construction to the constitution of the state as being interpreted by the legislature by the passage of the franchise act of 1893, which was superseded by the Broughton Act.

The doctrine of contemporaneous interpretation of statutes is well recognized by the adjudications.

*McPherson v. Blacker*, 146 U. S. 27;
*Packard v. Richardson*, 17 Mass. 143;
*Hovey v. State*, Ind., 21 N. E. 890.

In a case decided this year by the Court of Appeal of the state of California, concerning the contemporaneous construction of the charter of the City of San Diego, the court said that the presumption arising from the absence of express authorization of compensation by the charter is strengthened by the rule of contemporaneous construction, and the presumption from eighteen years' acquiescence supported the argument that it was not intended by the makers of the charter that the members of the common council should have any compensation for services.

*Woods v. Auditor of San Diego*, 95 Pac. Rep. 1125, p. 1126.

It may well be urged in this court that the conduct of the city in acquiescing in the high rates for telephone service for eighteen years, without an attempt to regulate such charges, and then attempting to reduce the charges by securing by contract a competitive system was a construction of the city charter and the Broughton Act that the city had such power to contract, and that the provisions of the charter did not afford due process of law so that it could regulate the rates of telephone charges.

At least it may be urged that the city, as was said by the court in the Omaha Water case, thought it had the power to make this contract.

*Omaha Water Co. v. City of Omaha*, 147 Fed. 1

The attempt of the city to regulate the rates of the complainant, as soon as complainant had complied with the contract and invested money on the faith of this

interpretation, should be construed by this court as an attempt to avoid an interpretation which the city itself had previously placed upon the law giving it power, and the language of Judge Cooley in *Port Huron v. McCall,* 46 Mich. 565, is pertinent to describe the situation in this case:

"This view of the statute is an afterthought on the "part of the city authorities. * * * The point is now "made, when its effect, if sustained, is to defeat obliga- "tions for which full value has been given, after the city "had appropriated the avails. * * * It is not very "agreeable for a court to be thus invited to a critical ex- "amination of words to defeat an obligation which has "been issued and paid for under an opposite interpreta- "tion."

There Judge Cooley was called upon to pass upon the validity of bonds issued by a municipality under a statute which the city, at the time of the litigation, claimed did not give the city power to issue the bonds.

In this case the bill shows that bonds of the complainant were issued and sold on the faith that the franchise constituted a contract as to rates, and the holders of these bonds are as much entitled to be protected from an "afterthought" interpretation of a statute by the city as though the city itself had issued the bonds.

*Detroit v. Detroit Citizens St. Ry. Co.,* 184 U. S. 368, p. 398.

III.

## THE CONTRACT.

**The ordinance "B," constituting the grant of complainant's franchise, embraces a contract as to maximum rates, mutually binding upon complainant and defendant.**

The central question in this case, about which all others revolve, is whether the ordinance "B" [Trans. pp. 22, 26] embraces a contract for maximum rates of charge for telephone service, mutually binding upon the complainant and defendant throughout the fifty-year term of the franchise, of which little more than forty-three years now remains.

It seems desirable to bring together at the outset, in as brief compass but as completely as may be, the elements of the precise case before the court.

*The application for the franchise as related to such contract considered.*

The proceeding which resulted in the granting of the franchise was initiated by filing with the council, at some time prior to June 24, 1901, of an application of one King therefor, as required by the Broughton Act.

*Notice of sale for franchise as related to such contract considered.*

Such proceedings were had by the council upon such applications, by references to committee, reports to and action by the council, that on the 28th of October, 1901, a notice of sale of the proposed franchise was considered and amended by the council, by extending the term of

the proposed franchise from thirty to fifty years. On November 4, 1901, said notice of sale having been matured, upon references and report thereon, was by the city council adopted in the form set forth in exhibit "A" of the bill [Trans. p. 20], and ordered published, and was duly published as required by the statute.

This notice stated that application was made for a grant of the proposed franchise for a period of fifty years, to "construct, maintain and operate," along and under certain public streets of the city, a system for "the purpose of transmitting sound, signals, conversa-"tion and intelligence by means of electricity and carry-"ing on a general telephonic business, *together with cer-"tain appurtenant and incident rights hereafter men-"tioned."* [Trans. p. 20.]

The notice then described the franchise and the terms and conditions thereof identically as was afterwards set forth in the ordinance "B," and invited sealed bids therefor, and stated that the franchise would be granted to the highest cash bidder, to whom it should be struck off at a public bidding held as prescribed by the statute.

The franchise was thereupon, in due course, after competitive bidding, sold to said King, as the highest bidder therefor, and ordinance "B" was passed, granting the franchise pursuant to said sale.

We may thus look to the ordinance which executed the grant of the franchise, not only to define the street franchise as it was offered for sale, but also to define said "certain appurtenant and incident rights" offered for sale, and sold with it, to King.

*Title of ordinance granting franchise as relating to such contract considered.*

The title to the ordinance is as follows, *to which we call particular attention:*

"An ordinance granting to M. A. King and his assigns, the right for a period of fifty years, *to construct, maintain and operate* conduits and wires enclosed therein, along and under certain public streets in the City of Los Angeles hereinafter described, and to erect and maintain poles and wires attached thereto upon, over and along certain public streets in said city hereinafter described, for the purpose of transmitting sound, signals, conversation and intelligence by means of electricity and carrying on general telephone business, *together with certain appurtenant and incident rights.*"

All the part of the title preceding the closing words, to wit: "Together with certain appurtenant and inci- "dent rights," refers to the *body* of the franchise. That body is the easement to occupy the designated streets with the physical structure of the telephone system, and to use such street by means of said structures, for fifty years, to carry on a telephone business.

What, then, can these "appurtenant and incident "rights" to the *body* of the franchise be?

We must look to the text of the ordinance to ascertain what these "appurtenant and incident rights" are, which were included in the application for the franchise and which are embraced in the title of the ordinance granting the franchise. They must be something accruing to the grantee. They are "*rights*," and not any physical thing made part of the structure, as are the traps and manholes referred to in section 3 of the ordinance.

Pursuing the inquiry, we first interrogate the general granting section of the ordinance, which is section 1. In that section, there is contained, first, the grant of the body of the franchise, which, as above stated, is the easement to occupy and use the street for fifty years in the manner and for the purpose therein set forth; this is followed in the last clause of the section [Trans. p. 22] by the proviso in the words following:

"Provided, however, that said conduit, said poles and "the wires enclosed therein or attached thereto, shall "be constructed, erected and installed, and *at all times "maintained*, and said right, privilege and franchise is "hereby granted and shall be *at all times exercised and "enjoyed in accordance with and subject* to each and "every of the terms and conditions of this ordinance, "and not otherwise."

This proviso expresses the mutual and reciprocal nature of the transaction and engagements between the city and the grantee.

The grantee is required *at all times*, i. e., during the entire life of the franchise, to wit, fifty years, to maintain the physical structure, and to exercise his franchise, subject to every term and condition of the ordinance.

On the other hand, his franchise shall at all times, i. e., during the entire life of the franchise, to wit, fifty years, *be enjoyed* by him *in accordance* with each and every of the terms and conditions of the ordinance.

*The terms and conditions to which the grantee of a franchise is subject.*

The ordinance contains numerous terms and conditions, *subject* to which the franchise shall be exercised.

These are all for the benefit of the city and its inhabitants.

Thus, by section 2, the size, material, location and construction of the conduits, the refilling of excavations made, etc., etc., are prescribed.

In section 3, the regulations for construction of traps and manholes are laid down.

In section 4, requirements in the event of change of grade of street and consequent shifting of conduits, are exacted.

In section 5, the time of commencement and completion of the structure, with a minimum capacity, is prescribed.

Section 6 requires the expenditure by the grantee or his assigns in construction of $25,000 within eight months, $75,000 within eighteen months, $150,000 within twenty-four months, and $200,000 within thirty-six months of the grant of the franchise.

Section 7 relates to the size and character of the poles to be erected and maintained.

Section 8 requires that the grantee or his assigns shall furnish the City of Los Angeles thirty telephones and maintain same in good working order, during the term of the franchise, without cost or charge to the city, and shall give the free use, on demand, of all necessary conductors, not exceeding 150 pairs, in the conduits for the uninterrupted operation of the fire alarm and police telegraph system of said city, and shall furnish the free use of the top cross arms on each pole of the system, all during the whole term of the franchise, for the pur-

pose of carrying wires used by the city for telegraph or telephone or police or fire alarm purposes.

Section 9 requires the telephone lines to have complete copper metallic circuits, and that the conduit system shall be sufficient to accomodate wires for ten thousand telephones.

Section 10 provides that neither the grantee nor his assigns shall sell the physical part of the system without the consent of the city by ordinance, or sell, lease or transfer or assign any rights in the franchise to any person, company, trust or corporation, now or hereafter engaged in the telephone, telegraph or conduit business, or to any person for any purpose; and, that the grantee shall not at any time enter into any combination, directly or indirectly, with anyone concerning rates to be charged for telephone or telegraph service; and that the grantee and his assigns shall have no officers, employes or managers who are connected with any other conduit or telephone system in the city. By the proviso, the assignment was permitted to be made to the complainant corporation.

Section 11 requires the payment to the City of Los Angeles, during the first five years of the term, annually, of 2% of the gross annual receipts.

Section 12 provides that any neglect, failure or refusal to comply with any of the conditions of the franchise shall thereupon immediately *ipso facto* work a forfeiture thereof.

We have thus gone over the whole ordinance and referred to all the terms and conditions to which the grantee is subjected by its provisions, save the second para-

graph of section 9 of the ordinance [Trans. p. 24], which we have reserved for separate consideration.

All of the provisions of the ordinance thus far specially noted are the *terms and conditions* to which the grantee and his assigns are *subjected*. They are exclusively for the benefit of the city and its inhabitants.

**What are the terms and conditions referred to in section 1 of ordinance "B," in accordance with which said section enacts that the franchise granted by it shall be at all times enjoyed by the grantee?**

We have thus examined all the provisions of ordinance "B," but that certain one contained in the last paragraph of section 9, and find that none of them are to be enjoyed by the grantee, but that all of them impose some obligation, burden or requirement upon the grantee in favor of the city.

To each of them the exercise of the franchise is, by the terms of section 1, made subject.

We are now in search of the "terms and conditions" in accordance with which section 1 declares that "said "rights, privileges and franchise * * * shall be *at "all times exercised and enjoyed*" by the grantee. We are seeking to find out what are the "*appurtenant and "incident rights*," together with which, the notice of sale states that the franchise was asked for in the *application* [Trans. p. 20]; and together with which the title of the ordinance states that it is granting the franchise.

We may properly look for some clue to the terms and conditions of the franchise to be enjoyed by the grantee, by considering the nature of the thing.

The accepting of a street franchise, subject to the obligations to expend not less than $200,000 in the construction of a telephone system within three years; under rigid continuing police supervision and regulations; to maintain and operate the same for fifty years; to furnish and maintain for the city, during that term, thirty free telephones, and one hundred and fifty pairs of complete copper metallic circuits, free; to make the city a co-owner, free of expense to it, of all the telephone poles, to the extent of the top cross arms of each, during the term of the franchise; subject to the further obligation to pay 2% of the gross revenues to the city, and to the obligation to compete with a rival telephone system already established and in the field—all these require expenditure. They are burdens, subject to which the grantee receives his franchise; they are obligations for which he is required by section 7 of the Broughton Act, to subject himself and his sureties to personal liability, by the filing of a bond, providing "for the performance "of every term and condition of such franchise."

Thus far all is outgo, labor and weariness for the grantee. To what end does the legislature, council, the law itself, expect that capital and enterprise would engage in such an undertaking?

There is but one answer. It is to earn that right to compensation, which is inseparable from the maintaining and operating of the public utility in which the street franchise is to be used. (See cases cited under the appropriate head of this brief, ante pp. 62-67.)

With this certain clue, let us resume our search for the terms and conditions referred to in section 1 of or-

dinance "B," in accordance with which said section enacts that the franchise granted by it shall be at all times enjoyed by the grantee.

**Such terms and conditions are declared in the second paragraph of section 9 of the ordinance, in the provision fixing maximum rates of charge for telephone service under the franchise. They constitute the contract as to rates.**

We submit that the terms and conditions for which we are searching are found in the second paragraph of section 9:

"That the rent or charge for a limited, independent, "metallic circuit telephone service in the system, estab- "lished or maintained under said franchise so long as "said system does not connect and exchange with more "than ten thousand telephones, shall not exceed $60.00 "per annum for a telephone installed in any business of- "fice or premises, or $30.00 per annum for a telephone "installed in a private residence; and that when the sys- "tem shall comprise more than ten thousand telephones, "the annual rental or charge for the aforesaid service "shall not be increased by more than a sum equal to $6.00 "per annum for each one thousand telephones in said "city, connected with said telephone system, in excess of "ten thousand."

We submit that when all the circumstances preceding, surrounding and entering into this grant of franchise by ordinance "B," are considered in construing the language of the paragraph of section 9 above quoted, it will clearly appear that it constitutes a contract, fixing maximum rates of charges for the term of the franchise

upon the principles decided and illustrated in the following cases:

*Vicksburg v. Vicksburg Water Works Co.* (1907), 206 U. S. 495;

*Cleveland v. Cleveland City Ry. Co.* (1904), 194 U. S. 517;

*Detroit v. Detroit City St. Ry. Co.* (1902), 184 U. S. 368, 375, 389;

*Omaha Water Co. v. City of Omaha* (1906), 147 Fed. 1;

*City of Detroit v. Detroit City Ry. Co.* (1894), 60 Fed. 161, 171;

*Bessemer v. Bessemer Water Works* (1907) (Ala.), 44 So. 663;

*State v. Leclede Gaslight Co.*, 102 Mo. 472, 22 Am. St. 789, 793;

*Pingree v. Michigan Central R. R. Co.* (1898), 118 Mich. 314, 76 N. W. 635, 639-640;

*State v. Yazoo & V. R. Co.* (1885), 62 Miss. 607, 641, 52 Am. R. 193.

In order to state the situation as concretely as possible, and for the purpose of comparison with features of the cases above cited, we number the separate statements as follows:

1 As shown by the bill and admitted by the demurrer, at, and for many years prior to, the sale of complainant's franchise, the telephone business in the City of Los Angeles was in the hands of the Sunset Telephone Company which had a monopoly of the service, and its system and service were of the most inferior description; and in consequence, there was a public desire for a com-

peting system, such as was described and provided for in ordinance "B."

2. At the same time, the city desired the full use of thirty telephones, the right to the free use of one hundred and fifty pairs of complete, unlimited, independent, copper metallic circuits in conduits, and the free use of the top cross arms of all the telephone poles for telephone wires for its fire and police departments and other municipal uses, all as afterwards provided for in ordinance "B."

3. The Broughton Act, then in force, required any franchise to use the streets for telephone service, to be sold at public auction to the highest bidder, and prescribed the requirements as to the time of commencement and completion of the construction, and the payment of 2% of the gross receipts to the city, all as afterwards provided in ordinance "B."

4. The act also required the proceeding for the sale of such franchise to be initiated by the filing of an application with the council. This was done by King, and seems to have been originally for a term of thirty years, from the fact next hereafter stated, that the bill shows (p 6) that the duration of the term was increased by the council to fifty years.

5. The council, being empowered by the Broughton Act to fix a term, increased the term of the proposed franchise from thirty to fifty years, and the application would appear to have been amended accordingly.

6. The council framed its notice of sale of the proposed franchise, embodying the identical terms and conditions contained in the subsequent provision by ordi-

nance "B," including the provisions as to maximum rates contained in paragraph 9 above set out.

7. King being the highest competing bidder at the public sale, the franchise was struck off to him.

8. Thereafter, the council, with the approval of the mayor, passed the ordinance "B" which was accepted by King, and a bond filed as required by the statute for the performance of its terms and conditions.

9. King having assigned the franchise so purchased to the complainant corporation, it constructed the system, is operating it, and has on its part done and performed, and is doing and performing in all things, its obligations imposed by the ordinance upon the grantee and his assigns.

When the terms of the ordinance itself in connection with all these circumstances, proceeding, surrounding and entering into the grant are considered, we most respectfully submit, that a stronger case of inviolable contract does not exist among those above cited.

### The Vicksburg Case Compared.

The Vicksburg case (*supra* 206 U. S. 496) was one in which a monopoly of the right to furnish water to the city of Vicksburg for a term of thirty years, had been in a former cause upheld by the decree in the Supreme Court of Mississippi, which was affirmed in this court (202 U. S. 453).

In that case, the contract clause contained in section 13 of the ordinance, read as follows:

"The said * * * Bullock & Co. * * * shall "have the right * * * to make such rates and charges "for the use of water as they may determine, provided

"that such rates and charges shall not exceed 50 cents "for each one thousand gallons of water."

The clause in this provision, to wit, "to make such "rates and charges for the use of such water, as they "may determine," added nothing to the right to charge rates not exceeding fifty cents for each thousand gallons. For, upon all authorities, as is indeed recognized in the Vicksburg case itself, quoting (206 U. S., at the bottom of page 511) from *Stone v. Yazoo & M. Valley R. Co.*, 62 Miss. 607, where maximum rates are fixed, the right to charge up to that maximum is implied; and the employment of express words to state what is necessarily so implied adds nothing to the meaning or effect of the provision fixing the maximum rates. The reason of this is, that from the nature of the thing, he who renders a service has the right to reasonable compensation therefor, and the fixing by contract or statute or ordinance of a maximum must be considered in the light of this principle, and means that all rates not exceeding that are reasonable and may be charged.

It is sufficient in this connection to cite the language upon this subject, of the early rate case of *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307.

"The case turns consequently on section 12 (of the "statutory charter) which is, 'that it shall be lawful " 'for the company * * * from time to time, to fix, " 'regulate and receive the toll and charges by them to " 'be received for transportation,' etc. This would have "been implied from the rest of the charter, if there had "been no such provision."

In the case last cited, the court held that the power of the state to fix maximum rates remained under the

act granting the charter, because in that act, as it said, "There is no rate specified or any limit set." We shall have occasion to return to this subject later.

The facts in the Vicksburg case upon the question whether a contract was made, are simple, involving only the construction of section 13 of the ordinance.

The facts and circumstances under which the paragraph of section 9 of ordinance "B" under consideration, was made part of the grant of the franchise, are far more numerous, and they all tend more emphatically to the conclusion that the provision as to maximum rates here is contractual for the period of the franchise.

Emphasis, by the court below, was laid upon the fact that section 9 of ordinance "B" did not expressly declare that the rates fixed therein were to continue during the life of the franchise. In answer to this, we call attention to the fact that section 13 of the contract ordinance in the Vicksburg case (206 U. S., p. 497) contained no such express stipulation; but simply provided that the rates and charges should not exceed 50 cents for each thousand gallons of water. That this provision as to rates extended throughout the term, was treated as the necessary meaning. But here it is more explicitly provided that the maximum rates shall cover the whole term, as we point out in connection with the consideration of the Cleveland case.

### The Cleveland Case Compared.

In the Cleveland case, 194 U. S. 517, 556, this court said:

"In reason, the conclusion that contracts were engen-
"dered would seem to result from the fact that the pro-

"visions as to rates of fare were fixed in ordinances for "a stated time and no reservation was made of a right "to alter; that by those ordinances existing rights of the "corporations were surrendered, benefits were conferred "upon the public, and obligations were imposed upon "the corporations to continue those benefits during the "stipulated time. When, in addition, we consider the "specific reference to limitations of time which the or- "dinances contained, and the fact that a written ac- "ceptance of the corporations of the ordinances was re- "quired, we can see no escape from the conclusion that "the ordinances were intended to be agreements bind- "ing upon both parties, definitely fixing the rates of "fare which might be thereafter charged. Taking all "the circumstances above referred to into account, the "case before us clearly falls within the rule as to the "binding character of agreements respecting rates ap- "plied in Detroit v. Detroit Citizens Street R. Co., 184 "U. S. 368, 46 L. ed. 592, 22 Supt. Ct. Rep. 410, and "approvingly referred to in Knoxville Water Co. v. "Knoxville, 189 U. S. 437, 47 L. ed. 891, 23 Sup. Ct. "Rep. 531."

Each of the circumstances mentioned by the court in the foregoing quotation as supporting the conclusion reached in that case, has its counterpart in the case at bar.

As in that case, the court pointed out the fact that the provision as to rates of fare were fixed in the ordinance for a stated time, and no reservation was made of the right to alter, so here the provision of section 9 divides, for the purpose of adjusting the rates, the term of the franchise into two periods covering the whole. One period is *"so long as the system does not connect "and exchange with more than ten thousand telephones;"* the other period is *"when said system shall comprise "more than ten thousand telephones;"* and one set of

maximum rates is fixed for the former period; and another for the latter period; and there is no reservation anywhere in the contract, ordinance, city charter, statute or constitution, of the power to alter this schedule of rates.

As the ordinances there limited the time, so does the ordinance here limit it to 50 years.

As in that case, benefits were conferred on the public; so here a new, improved and competing telephone system was secured for the public; a free telephone system was secured for the city; the right to share in the gross receipts for the entire term was acquired by the municipality; and these obligations were imposed on the complainant and a bond exacted to secure their performance during the whole term of the franchise.

As there was a written acceptance of the ordinance there; so was there here, *first*, by the written application required by the statute; *second*, by the sealed bid required it; *third*, by the record made of the sale by the city acting as auctioneer, which alone would be sufficient under the statute of frauds; *fourth*, by the execution and filing of the bond to perform all the terms and conditions of the ordinance.

In addition to all this, is the practical acceptance of the ordinance as alleged in the bill. [Trans. pp. 13-14.]

The Cleveland case, however, was one of consolidation, and therefore tended to a monopoly. But in this case, not only did the conditions expose this new enterprise to instant competition, but the ordinance was framed drastically to prevent any sort of combination as to rates and to secure competition for the entire

term. It is but needed to state this to show at once the influence of this consideration upon the understanding of both parties to the transaction, respecting the provision as to rates. This is a very weighty circumstance over and above any in the Cleveland case, tending to the conclusion that the ordinance was intended to be an agreement binding both parties as to rates for the term of the franchise.

But this is not all that makes this case a stronger case for a contract as to maximum rates mutually binding upon both parties.

For, it is always to be remembered that the city sold this ordinance as an entirety. It did not sell alone the easement of the streets, subject to the covenants and obligations of the vendee, for the benefit of itself and its inhabitants. It sold the ordinance with the provisions in it as to maximum rates.

The sale itself was a contract. How can any element of the thing sold, especially the only element of value to the purchaser, be withdrawn from the operation of the sale, on the score that it was not contractual? We shall see later in what inconsistency such a condition would involve the city as respects the rates.

In this regard, this is a more patent and inexorable case of a mutual contract as to rates than is the Cleveland case.

### The Detroit Case Compared.

The learned court below held [Tr. 66-67] that *Detroit v. Detroit Citz. Ry. Co.*, 184 U. S. 368, 375, 389, is widely and readily distinguished from the case at bar,

and that it is not any authority in support of the bill.

We respectfully submit that it is a pertinent authority, and that to say the least, the case now before the court is as strong a case of inviolable contract as to rates as that case was held to be.

That case ruled definitively that where, under statutory authority, the city of Detroit passed an ordinance consenting to the occupation of a street for a street railway and used therein the following language: "The "rate of fare for any distance shall not exceed five cents "for any one car or any one route named in this ordi- "nance," it amounted to a contract.

The court said (*Ibid* pp. 386):

"Coming to a consideration of the language used, we "think it amounts to a contract as to rates of fare."

And on p. 389 *Ibid*:

"Nor does the language of the ordinance which pro- "vides that the rate of fare for one passenger shall not "be more than five cents, give any right to the city to "reduce it below the rate of five cents established by the "company. It is a contract which gives the company the "right to charge a rate of fare up to the sum of five "cents for a single passenger, and leaves no power with "the city to reduce it without the consent of the com- "pany."

Is not this plain, pertinent and pointed authority to establish that the *language* of the second paragraph of section 9 of ordinance "B" is a *contract*, and that unless a reserved power can be found somewhere, permitting an alteration of the terms of that contract to be made by the common council as it may from time to time prescribe, such contract is protected by the contract clause and by the fourteenth amendment of the constitution

from being violated by subsequent rate ordinances?

Returning to the Detroit case, it will be found that the occasion for the extended discussion in the opinion, was not any question over the import or construction of the maximum rate provisions there considered; or any doubt that they constituted contracts. But such discussion was called out by the contention of the city that a provision in section 34 of the Tram Railway Act, providing that the consent of a city to construct a street railway through its streets shall be "under such regula-"tions and upon such terms and conditions as said au-"thorities may from time to time prescribe," permitted an alteration of the terms of the contract, as the council might from time to time prescribe. (*Ibid* 383-384.)

To overcome this contention, the court called in sections 20 and 29 of the subsequent Street Railway Act and subsequent ordinances importing the provisions of the said sections into the relation between the city and the holder of said franchise under the provision of the prior Tram Railway Act; and it was this contention, and a like contention based upon the alleged similar reservation of power in the consenting ordinances themselves to alter the contract as to rates, which evoked from the unanimous court its forcible exposition of the vital nature of rate provisions in said franchise, and its vindication of the inviolability of the contracts giving the right to charge up to a maximum therein fixed.

While this case differs from the Detroit case in the fact that here there is no expression in constitution, statute or ordinance, upon which even a plausible contention for any express reservation of power to alter the

contract relation can be based, in consequence of which the court will here not meet the embarrassment from a like contention to that which is disposed of in the Detroit case, the language of the court is as pertinent here, as there, to show that the rate which the council of Los Angeles *"fixed and determined"* in the ordinance which it put up for sale and sold, is a living and inviolable part of the sale and grant.

In its opinion, this court, after citing *Pingree v. Michigan C. R. Co.*, 181 Mich. 314, 76 N. W. 635, and stating the holding of that court, that the legislative incorporating act, permitting the company to charge fares, subject only to the limitations as to passengers of three cents per mile, conferred a contract right to fix tolls within the limits of three cents a mile, which could not be violated by acts of succeeding legislatures (184 U. S. 384), said:

"There is no provision in the act referred to in the "above-cited case, of a nature similar to the one in "question here, providing for regulations, terms, and "conditions which might from time to time be pre-"scribed. The case shows, however, that in the opinion "of the Supreme Court of Michigan language similar to "that used in the ordinance (omitting such provision) "amounted to a contract, and the question remaining "would be whether the further language contained in "the ordinance permitted an alteration of the terms of "the contract as the common council might from time "to time prescribe. The rate of fare is among the most "material and important of the terms and conditions "which might be imposed by the city in exchange for its "consent to the laying of railroad tracks and the running "of cars thereon through its streets. It would be a "subject for grave consideration and conference be-"tween the parties, and, when determined by mutual "agreement, the rate would naturally be regarded as

"fixed until another rate was adopted by a like agree-
"ment. Can it be possible that under this language per-
"mitting consent upon such terms and conditions as the
"city might from time to time prescribe, the power was
"reserved to make a rate of fare which might ruin the
"whole enterprise? That a rate once deliberately and
"mutually agreed upon might be thereafter and from
"time to time altered at the pleasure of the city alone?
"Will it be believed the parties thus understood the mean-
"ing of that provision? It would hardly be credible
"that capitalists about to invest money in what was
"then a somewhat uncertain venture, while procuring
"the consent of the city to lay its rails and operate its
"road through the streets in *language* which as to the
"*rate of fare amounted to a contract*, and gave the com-
"pany a right to charge a rate then deemed essential for
"the financial success of the enterprise, would at the
"same time consent that such rate then agreed upon
"should be subject of change from time to time by the
"sole decision of the common council. It would rather
"seem that the language above used did not and was not
"intended to give the right to the common council to
"change at its pleasure from time to time those impor-
"tant and fundamental rights affecting the very exist-
"ence and financial success of the company in the opera-
"tion of its road, but that by the use of such language
"there was simply reserved to the city council the right
"from time to time to add to or alter those general regu-
"lations or rules for the proper, safe and efficient run-
"ning of the cars, the character of service, the speed and
"number of cars, and their hours of operation and mat-
"ters of a like nature, such as are described in the opin-
"ion of the court below in this case. Such would seem to
"be a reasonable construction of the language."

And when considering the like contention for reserved power over the rates, based on provisions of the ordinances themselves, which contain the contracts, the court again said (*Ibid* 398):

"The fixing of rates is, as we have already said,

"among the most vital portions of the agreement between "the parties contained in the ordinances. It cannot be "supposed for one moment, with regard to a right so "fundamental in its nature, that there was any inten- "tion to permit the common council in its discretion to "thereafter make an alteration which might be fatal to "the pecuniary success of the company. For the rea- "sons already given, we think the language used does "not, in fact, give any such power to the common coun- "cil."

If the enterprise in question in that case was "a "somewhat uncertain venture," what shall be said of the undertaking in the case at bar, where, to begin with, the enterprise was pitted against a competitor already in the field, and by the terms of its franchise the complainant is rigidly compelled to remain a competitor during the life of the franchise; where the grantee of the franchise was compelled to buy at a public sale, upon competitive bidding; to expend not less than $200,000 in the construction of the system within three years; to furnish certain service and facilities to the city, free of charge, throughout the terms of the franchise, of the reasonable value as shown by the bill and admitted by the demurrer, of nearly half a million dollars; and furthermore, to pay to the city two per cent of the gross annual receipts of the system during the whole term of the grant (except the first five years)? Would any rational business man embark on such an enterprise without a contract as to rates?

Did the legislature, or the city, expect that any capital, burdened with these terms and conditions, would commit itself to the uncertainty of the action of successive councils, or to the action of the popular elector-

ate, holding the power to legislate directly under the then contingent but now actual initiative and referendum provisions of the charter, upon rates for public utilities, without so much as a contract provision, fixing maxima of rates, subject as they are to be forced downward by the competition of an established and powerful rival?

We submit that the circumstance surrounding this case, as bearing upon the intention and expectations of the parties in the sale and purchase of this franchise, make a case, to say the least, not less strong than the Detroit case.

The Detroit case also furnishes a plenary answer to the suggestion of the learned court below [Tr. p. 63] that section 9 of ordinance "B" is not a grant, but a limitation. To this matter we shall briefly recur later. It also contains pertinent matter relative to the provision of section 8 of ordinance "B" [Tr. 24], in which the court below finds no contractual significance [Tr. 70], to which we shall recur later.

We have already suggested that the importance of the express provision in section 20 of the Michigan Street Railway Company, providing that the rates shall be established by agreement, was invoked more especially to rebut the contention of the city there, of a reserved power to control the contracts constituted by the language "establishing maximum rates."

Although, as already said, there is no ground here for the contention that there is any such reserved power, we submit that when the legislature of California required franchises to be made the subject of public bar-

gain and sale, the matter of rates, being necessarily and vitally involved, was made as much a matter of agreement, as this court held it to be under the Michigan Act.

In the Detroit case, the company, in full reliance upon its right to charge the rates of fare fixed by the various contracts and grants, and for the purpose of procuring such money as it was necessary that it should have, for the construction, maintenance, repair, reconstruction and operation of the various lines, had issued its bonds and borrowed thereon the money so needed. (184 U. S. 370-1.)

So in the case at bar, the complainant, in the belief that the clause declaring maximum rates could not be changed, nor the rates reduced during the life of said franchise, constructed the plant, and in full reliance upon its right to charge the rates fixed by said franchise and for the purpose of procuring such money as it was necessary it should have for the construction of said system, issued its mortgage bonds to the amount of $2,500,000 and borrowed thereon the money so needed, upon the faith of said contract, and the purchasers of said bonds bought them in the full faith and belief that complainant had a right to charge the full rates fixed by said franchise. [Tr. pp. 13-14.]

The bill in this case goes further and alleges that no further stock and bonds of the company can be marketed for the purpose of completing said telephone system, except by sacrificing both.

In these features the case at bar presents a much stronger case than the Detroit case.

THE OMAHA CASE COMPARED.

In considering the case of *Omaha Water Co. v. City of Omaha*, 147 Fed. 1 (June, 1906), the Circuit Court of Appeals for the Eighth Circuit reviewed all the rate cases decided by this court, except the Vicksburg case, when last before the court, and reported in 206 U. S. 496, decided May, 1907.

The facts of the Omaha case are so closely on all fours with the fundamental facts in this case, that we might well present the reasoning of the court and the review of the authorities in that case as appellant's sole argument for the reversal of the decree here appealed from.

There are, however, the features of special contractual obligations exacted of appellant for the benefit of the city of Los Angeles, to which we have frequently hereinbefore referred, the like of which do not exist in the Omaha case, which superadd emphasis to the considerations common to both cases, in support of the contract in this case as to rates.

We pointed out in considering the Broughton Act, that the legislative authority conferred by it upon the council, to provide new public utilities in its discretion by the sale of telephone and street railway franchises to use streets, embraced the power to agree upon rates.

The power under the Nebraska Act, considered in the Omaha case, was not broader nor more specific; for the power there given "to contract and maintain water-"works on such terms and under such regulations as "may be agreed on" (*Ibid* p. 5), has its equal counterpart in the requirement of the Broughton Act, that the

franchise with its "terms and conditions" (*vide* Sec. 8 of the act) should be publicly sold: for how can the offer to sell be made and be accepted, and ripen into a contract, without coming to an agreement upon those "terms and "conditions?"

The terms and conditions of the franchise as proposed for sale by the city of Omaha, that any person who should construct the contemplated water-works should furnish water "at rates which should not exceed a cer- "tain tariff of water rates, set forth in the ordinance" (statement of case, *ibid*, p. 3), are not in principle or form different from the provisions as to the maximum rates contained in section 9 of ordinance "B."

The fact that the city council of Omaha, in the exercise of its discretion, adopted the plan of publicly selling the franchise, does not distinguish that case from this, in which the statute required such public sale. We say, as the court said there (p. 13):

"The ordinance was an offer by the city of the terms "and regulations under which it would enter into a con- "tract for the construction and operation of a water- "works. The city prepared and passed the ordinance, all "its terms and words are the language of the city."

The fact that the Omaha council, in the exercise of its discretion, required a bond for the faithful performance of the terms and conditions of the ordinance, does not distinguish that case from this, in which the statute required a similar bond.

If the purpose there was, as the court said (*Ibid*, p. 6), "to procure water and to get rates for the city and its "inhabitants," was it not here, to procure a new com-

peting telephone system and get rates (special) for the city, and for its inhabitants?

Were there any rates for this enterprise to be regulated before this contract was made, any more than in that?

It is impossible, thus far, to distinguish the cases, except in the fact that there the council elected to make the term twenty-five years; here, under express statutory requirement and discretion to fix a term, the council did so, at fifty years.

As we have already pointed out in considering the Broughton Act, the matter of the term having been committed by the legislature to the discretion of the council, it was a matter to be determined by it wholly upon the grounds of public policy, with which the courts are not concerned.

*Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U. S., *supra*, p. 317.

As was pertinently said, respecting a similar power to fix rates, in a quotation made by this court from a Mississippi case against the Vicksburg Water Co., 206 U. S., at p. 515:

"Within its charter powers, the board has a discre-"tion, independent of courts, and no exercise of it will "be held valid for unreasonableness unless so gross as "to strongly suggest fraud or corruption. The people "elected their council, and the courts are not chosen "members of it."

Now, when the superadded features of this case are considered, to wit, the conditions of competition which the ordinance makes perpetual; the free telephone serv-

ice and facilities to be furnished to the city and maintained by the grantee of the franchise; the statutory requirement to pay to the city two per cent of the gross earnings throughout the whole term, can we be mistaken in insisting that the opinion in the Omaha case is intensified thereby, as an authority here?

We submit that the case of the *Knoxville Water Co. v. Knoxville,* 189 U. S. 434, relied upon in the opinion of the court below in support of its decision, is disposed of as being of no opposing authority here by the quotation from that case itself, made and relied on in the Omaha case to distinguish it from the Knoxville case, and to bring it within the Detroit case (*Ibid,* page 9).

In line with the exposition by this court in the Detroit case, of the vital element of the agreement as to rates, in every such transaction is the following from the Omaha case (147 Fed. 1, 13):

"The main purpose of city waterworks is the revenue "derived from private consumers of water. The rates "which they pay absolutely determine the financial suc- "cess or failure of a city water company's enterprise "The term or regulation in a contract for the construc- "tion and operation of waterworks, which more than "any other conditions the nature and the prospect of the "undertaking, is that which fixes the rates which the "owner may collect of private consumers. These are "matters of common knowledge. The members of the "legislature could not have been ignorant of them when "they granted to this city the power to agree upon "terms and regulations upon which the works should be "built and operated, and it is incredible that they intend- "ed to except from this general grant, the authority to "agree upon the cardinal term which alone conditions "the success of the entire undertaking."

We ask for this case the special attention of the court as having garnered the results of the labors of this court in the previous cases, and as being so closely akin in its facts, to the case at bar.

**The contention for the city appellee, that the provisions in section 9 of ordinance "B," fixing maximum rates, are binding upon complainant, but not upon defendant, cannot be maintained.**

We are now brought to consider the position taken by the city, defendant in this suit, on the rate provisions of the ordinance "B." We have found upon the foregoing analysis of that ordinance, that section 1 thereof contains the grant of the body of the franchise, to which nothing is added in any later part of the ordinance, even by the permission expressed in section 3, that traps or manholes may be constructed along the line of the conduit. The permission to construct these, as being an essential part of the conduit system, is necessarily included in the grant for the conduit itself, contained in section 1, and is only referred to in section 3 as introductory to the requirements therein contained, as to the location and construction of such traps and manholes.

So we may still say that for the whole body of the grant of the franchise, we look to section 1.

We further find that everything else in the ordinance, except the second paragraph of section 9 thereof, consists of requirements imposed upon and obligations exacted from the grantee.

These embrace:

1. Requirements relating to the location, size, quality, material and manner of construction of the several parts

of the physical structure of the proposed telephone system.

2. Requirements as to the time of the commencement and prosecution and completion of the work of construction.

3. Requirements as to the sums of money to be expended in construction within given periods of time.

4. The obligation, executory and promissory in its character, contained in section 11, that the grantee or his assigns shall, during the life of the franchise, pay to the city two per cent of the gross annual receipts in any way accruing from the business in which the franchise is employed. This obligation is prescribed by the statute, but is not the less a part and parcel of the relation between the city and the grantee.

5. The provisions contained in section 10, that neither the grantee or his assigns shall, without the consent of the city evidenced by ordinance, sell or assign its plant, or sell, lease, transfer or assign its franchise to any one now or hereafter engaged in the telephone, telegraph or conduit business, or to any person for any purpose; and that it shall not at any time, enter into any combination with any persons or corporation, concerning rates for telephone service; and that no officers, employes or managers of the system, authorized under the franchise, shall at the same time be in charge of, or officers or employes or managers of any other telephone system within the city.

6 The important obligations, executory and promissory in their character, contained in section 8 of the ordinance, imposed upon and assumed by the grantee for

the exclusive benefit of the municipality as such.

7. The further obligations imposed by section 7 of the Broughton Act, to give a bond for the performance of "every term and condition of the franchise;" this is just as much a term of the grant as though it had been written in the ordinance.

We have also pointed out that aside from the body of the franchise granted by section 1 of the ordinance, the only provision for the benefit of the grantee, is contained in the second paragraph of section 9, and relates to the fixing of rates which, as said by this court in the Detroit case, *supra*, is a *"most vital portion of the "agreement between the parties contained in the ordi- "nance."*

This paragraph, for visual convenience, we quote again:

"That the rent or charge for unlimited, independent, "metallic circuit telephone service in the system estab- "lished or maintained under said franchise, so long as "said system does not connect and exchange with more "than ten thousand telephones, shall not exceed $60.00 "per annum for a telephone installed in any business of- "fice or premises, or $30.00 per annum for a telephone "installed in a private residence, and that when said "system shall comprise more than ten thousand tele- "phones, the annual rental or charge for the aforesaid "service shall not be increased by more than a sum "equal to $6.00 per annum for each one thousand tele- "phones in said city, connected with said telephone sys- "tem, in excess of ten thousand."

If we mistake not, the ultimate defense of the city here, is based upon the construction put by it upon this maximum rate provision, which is reflected in the fol-

lowing passage from the opinion of the learned court, found at p. 63 of the transcript:

"Furthermore, section 9 of ordinance B is not a grant, "but a limitation. The franchise granted in the first "section to construct a telephone system and carry on "a general telephone business necessarily implies a "right to charge reasonable rates for telephone service "(*Winona, etc., Co. v. Blake*, 94 U. S. 180), and sec- "tion 9 is but a limitation upon this right. It confers "nothing, but simply qualifies what has already been con- "ferred. It does not give any right whatever to the "plaintiff, much less a right to charge up to the maxi- "mum rate, for fifty years, but is simply a legislative "declaration that any charge in excess thereof would at "that time be unreasonable."

We are not certain that we clearly understand all of the foregoing statements. If the maximum rate fixed in section 9 is a "limitation" on the right to charge reasonable rates, then such limitation must make the rates something other than reasonable.

Again, if section 9 "qualifies" the right to reasonable rates already conferred, such qualification must amount to a prohibition to charge what is reasonable.

Yet it seems to be said that the section is a legislative declaration of what is reasonable.

But section 9 cannot, in the nature of things, be at once a "limitation" or a "qualification" on the right to charge reasonable rates, and at the same time establish what is reasonable.

However that may be, the city's position in the last analysis is, that this provision has in it no contractual element whatsoever; that it is ordained by the mayor and the council of the City of Los Angeles, purely and simply as a law, emanating from a political superior in

the exercise of purely governmental power to regulate the rates of charge, and acting *nolens volens*, the grantee of the franchise.

And that (so runs the contention), being thus purely a law, without containing any contractual element, it is like any other such law, subject to repeal or amendment at any time in the discretion of the acting repository of the law-making power of the City of Los Angeles, for the time being, whether that be the mayor and council, or the electoral body of the city and mayor and council, or the electoral body of the city alone. We submit that the contention cannot be maintained.

**The Origin of the Provision as to Maximum Rates is Contractual.**

We inquire, first, as to the *genesis* of this provision as to maximum rates. It is found in the *proposal* of the city, contained in the "*Notice of Sale of Telephone Franchise.*" [Exhibit "A," Tr. p. 20.]

It was a part and parcel (this court declares, a *vital* part and parcel) of that which was included in the bid which was *accepted* and which was paid in cash by the grantee. To be "vital," it must have been alive when the sale was closed. It was then an existing, active and living element in the transaction. It survived the bidding, and became an "appurtenant and incident right" to the body of the franchise as sold.

This being the genesis of this rate provision, we resume our scrutiny of this contention for the city, and ask, Was this a law at the time the franchise was struck off, in which the purchaser had no contractual voice?

By no possibility was it then a government regulation of rates. There was not then, nor had there been before that, any service, the charges for which could be the subject of regulation. As was epigrammatically said in the Omaha case, there were "no rates to regu-"late." (147 Fed. 1, 6.)

It was as purely contractual as any like agreement for rates of service between private contracting parties.

Now, the ordinance "B" was passed *afterward*, and not before, the making of this contract.

This vital agreement as to rates, stamped in its birth and full maturity as a pure contract, passed into that ordinance. The ordinance itself is in its dominant feature a grant; and a grant which was made to carry out and execute the prior agreement of a bargain and sale.

To be sure, on the part of the city, it was a legislative act. Inasmuch as the city is an artificial being, it must act through its agencies; and the legislative department is the appropriate agency to give the municipal consent to contracts and to execute grants pursuant to its contracts and embodying the provisions of its contracts.

We submit, then, that this contract as to rates passed into and became a living and organic part of the ordinance, and so far from its contractual vitality being lost in the process, that very thing was solemnly adopted and confirmed by the ordinance.

*No occasion to minimize the features of the ordinance as a law.*

Because this ordinance, as to its rate provisions and many other provisions, constitutes a contract, it is not

the less a law—a law binding upon the complainant, upon the city, and upon its inhabitants.

The Omaha case has the distinguished merit of pointing out the fact that in a transaction, such as that here under consideration, the municipality acts in a double capacity—that of a contracting party, and that of a law-making power.

To illustrate by the case in hand:

Unquestionably, the complainant is bound by this ordinance not to exceed the rates of charge fixed by it. To be sure, it is bound by its contract not to do so. But the contract having passed into the ordinance, if there are any provisions, penal or criminal, in the code of the city, as sanctions to enforce the observance of this limitation, the complainant is subject to them.

Again, although the rendition of its service by a public utility corporation is enforcible by the process of mandamus, neither the city nor any individual can enforce the telephone service by compulsion of law, or by invoking the courts, for any less than the maximum fixed in the ordinance.

All this is because the ordinance has crystallized the contracts, and has become a law on the subjects contained therein.

But the distinguishing feature of the ordinance as to rates is, that because, under authority of the state, it had its origin, and its mature development, in contract, it is protected by the constitutional guarantees which forbid that such contract be impaired by subsequent legislation, or that its benefits be taken away from the complainant without due process of law.

*The contention for the city that the provisions as to maximum rates, contained in the ordinance, are not contractual, is grossly inconsistent with its claim to, and enjoyment of other rights under ordinance "B."*

This case, in a greater degree than any similar reported case that has come under our observation, exhibits on the part of the city, a position so grossly inconsistent that such position is self-destructive.

The city here is in the predicament of claiming that every stipulation in this ordinance-contract (the designation used in the recent case of *City of Bessemer v. Bessemer Water Works*, 44 So. 663, 665) for its benefit, *is* contractual; but that the most vital provision for the benefit of the grantee of the franchise is *not* contractual.

More specifically than that, it is in the truly awkward predicament of claiming in one breath that the provisions in the ordinance, involving *telephone service* free of rates exacted for its benefit, *are* contractual; but in the next breath, that the provisions as to rates for *telephone service* for the benefit of the grantee of the franchise, are *not* contractual, but continuously at the mercy of the city.

1. The first provision for the payment of two per cent. of gross revenue to the city is not the less contractual, in that the statute requires it as a term and condition of the sale; it is to be secured by the bond filed. It is executory and promissory in its nature.

This being contractual as a part of the terms of the sale of the franchise, why is the provision as to maximum rates, which stood side by side with it on the auc-

tion block and was struck off by the same fall of the hammer, not contractual?

2. And again, in what category shall section 10 of the ordinance be ranked—in that of contract, or that of governmental regulation?

Suppose that the provisions of this section had not been part of the notice of sale nor accepted by the bid, and not part of the ordinance; but that the ordinance had consisted solely of the grant of the franchise contained in the first section.

Would anyone contend that, after the acceptance of the franchise, it would have been competent for the city to have forced provisions such as are there contained, upon the grantee? Could the city have enacted a valid ordinance forbidding the complainant to sell its plant without the consent of the city expressed by ordinance, or to sell, lease, transfer or assign its franchise to any person, company or trust then or thereafter engaged in similar business, or to anyone else; or that it should not enter into any combination concerning rates, or that it could have no officers, employes or managers who were in charge of, or were officers, employes or managers of any similar system, constructed or operated in the city?

Certainly not. These are all matters of purely contractual origin.

3. And finally coming to the provisions of section 8 of the ordinance, we make the crucial inquiry, Are these contractual or governmental in their nature and origin? Let their character be observed:

"That the grantee * * * shall * * * furnish "to the City of Los Angeles 30 telephones and connect "the same with the telephone system of said grantee, or

"his assigns, and thereafter maintain and keep the same "in good repair and working order during the term of "this franchise without expense or charge to the City of "Los Angeles.

"That said grantee * * * shall, if required by said "city, furnish and allow to it, during the term of this "franchise, the free use of all necessary conductors, not "exceeding 150 pairs in said conduits, for the uninter- "rupted operation of the fire alarm and police telegraph "system of said city.

"And the free use of the top cross-arm upon each of "the poles erected or maintained under this franchise, "during the whole term thereof, for the purpose of car- "rying or stringing the wires used by said city for tele- "graph, telephone or police, or fire alarm purposes."

These provisions all relate to the service of complainant's system, and as to charges for such service, providing that there are to be none; that they should be free "during the term of the franchise." The entire service, the bill alleges, will amount in value during such term to upwards of $400,000.

Would anyone say that after the franchise had vested, if there had been no such provision in the franchise ordinance, that any power on earth could have legislated away *in invitum* the value of these services to the tune of hundreds of thousands of dollars from the complainant, and transferred the same by legislative fiat to the city? The question answers itself.

Then, if this is not governmental, it must be, as it is, contractual. The city is enjoying it at this very time as such.

And yet it is here claiming that the provisions as to the remainder of complainant's telephone service, fixing maximum rates is *not* contractual; that it is a mere leg-

islative declaration for the time being, subject to be superseded by other declarations, absolutely without limit as to time or number.

Can the city be held to take such liberties with this contract ordinance as it claims respecting the provisions relating to the service of this telephone company, that when they are for the benefit of the city, they are contractual; but when for the protection of the complainant, they are legislative and no protection at all? This question is self-answering. They are both of co-ordinate origin, equally contractual, and equally binding, during the whole term of the franchise, unless they are changed by the mutual consent of the parties.

But we are not left to our unaided reasoning in this matter, because this court has passed upon the like situation, but in a far milder form, in *Detroit v. Detroit Citz. St. R. Co., supra,* 184 U. S., p. 386.

It there appeared that the ordinances in question contained provisions for special taxation of the companies. The Supreme Court of Michigan had held these to be binding, contractual provisions. The similarity of this provision to those here under consideration is marked, although those here are much more varied, pronounced and closely interrelated; for the provision in ordinance "B" as to free service of the telephone system to the city is of the same generic as the service for which maximum rates are fixed therein.

This court, after noticing the fact that this special taxing power in the ordinance, has thus been held by the Superior Court of Michigan, to be contractual, said:

"If the ordinance constituted a contract between the

"parties in relation to taxes which were to be levied upon "the company, we do not see any reason, in the language "used providing for the rates of fare, for not holding "that there is a contract as to those rates, equally bind- "ing with that in regard to taxes."

It will be remembered that the language in the Detroit case, which was held to amount to a contract as to rates of fare, was as follows: "The rate of fare for any dis- "tance shall not exceed five cents for any one car or any "one route named in this ordinance. * * *"

**The Language in Section 9 of Ordinance "B" Aptly Expresses a Contract as to Rates.**

Having thus arrived at a demonstration that the provisions of section 9, fixing maximum rates as they stand, entered into this ordinance contractually, it is next in order to examine its language to obtain its contractual meaning.

The court below, in the extract from its opinion above quoted, conceded, as it must be on all hands, that the grant of the franchise "in the first section, to carry on "a general telephone business, necessarily implies a right "to charge reasonable rates for telephone service." The grant would undoubtedly have done so, had the provision as to maximum rates in section 9 been left out altogether.

What, then, is the contractual import of that provision? The court below suggested that it is "but a lim- "itation."

That it is a limitation cannot be denied. But on whom is it a limitation, upon *one* or *both* of the contracting parties? Since this provision is in its origin and subse-

quent history a contract, upon what reasoning can its limitations bind only one party to the contract and leave the other free to disregard it and overthrow it? How can one party to a valid contract, at the same time, both observe and disregard its provisions?

If it is a contract, to say that it confers nothing, is to say it means nothing; is to nullify the contract.

To say it does not give any right whatever to complainant, is to deny it any significance. For, if the right to charge rates existed before, and this confers nothing, —creates no right whatever, what significance has it as a contract provision?

The argument all comes to the result that it "is sim-"ply a legislative declaration," i. e., a pure law, which we have shown is everlastingly not true. Being contractual, it is not, and cannot be, "simply a legislative "declaration" that any charge in excess thereof would at that time be unreasonable. If it is a contract contained in the grant, it is not a mere "legislative declara-"tion" that may be at any moment withdrawn; it is not a provision merely for the time when the declaration was made, but for the duration of the franchise.

It is time to invoke the authorities. Among the earliest of cases in this court was *Chicago B. & Q. R. R. v. Cutts*, 94 U. S. 155. The illustration was there put of a case where the charter, corresponding to the franchise ordinance here, would contain a maximum of charge. The court said (*Ibid*, p. —):

"It was within the power of the company to call upon "the legislature to fix permanently this limit, and make "it a part of its charter, and if it was refused, to abstain

"from building the road and establishing the contem-
"plated business.

"If that had been done, the charter might have pre-
"sented a contract against future legislative interfer-
"ence."

We submit that substantially what was in that case put by way of illustration, was here done in actual and sober fact.

Again in *Stone v. Farmers Loan & Trust Co.* 116 U. S. 507, the court said of the point decided by it there:

"This is not in conflict with the judgment of the Su-
"preme Court of Mississippi, in Railroad Com. v. Yazoo
"& Mississippi Railroad Co., in which it was decided
"that the power had been surrendered in favor of that
"company because *in that charter* a maximum of rates
"was fixed."

We submit that the decisions of this court have never departed from the recognition given to the doctrine that the fixing of maximum rates in a franchise or charter is contractual.

As was well said by the Supreme Court of Missouri, *State v. Laclede,* 102 Mo. 472, 14 S. W. 974, 979, *supra:*

"If the contention of relator is to prevail then it
"would have been but an idle ceremony to have inserted
"in the ordinance any maximum price at all, since, ac-
"cording to that contention, the city had *carte blanche*
"to insert at her pleasure any figure beneath the maxi-
"mum, and to compel the respondent to accept it. But
"this would have been tantamount to making a contract
"where one party dictates the price,—something which
"certainly seems at variance with all of our precon-
"ceived ideas as to the fundamentals of a contract. With
"equal propriety, a payee in a promissory note payable
"on or before a period of six months after its date,
"might contend that this was only the maximum of time

"in which the payor had to pay, and that as there was "nothing in the note 'prohibiting' payment before the "ultimate date, therefore it would be in the 'discretion' "of the payee to demand payment at an earlier period. "We are not of the opinion that the ordinance will bear "any such unwarrantable construction as relator desires "us to place upon it. This is a case where 'an affirma- "'tive specification excludes implication.' Maguire v. "Association, 62 Mo. 346, and cases cited; Broom, Leg. "Max. (8th Ed.), 652, 667. Counsel for relator claims "that on this point the rights of the city, and of the re- "spondent company, 'under the ordinance, are reciprocal.' "If so, then manifestly the respondent would have as "much right to charge above the price mentioned as "would the city to compel the acceptance of a sum below "it; otherwise there could be no reciprocity."

And by the Circuit Court of Appeals for the Eighth Circuit, on the same subject:

"The concession is readily made that the acceptance "of this ordinance constituted a contract by the water "company to furnish the water to private consumers at "prices not exceeding those named in the ordinance. "The contention is that it left the city free to reduce "them. If so, the contract permitted the city to retain "the power to withdraw from the water company all the "substantial benefits of its undertaking, for a reduction "of the rates to private consumers would diminish the "most substantial part of its revenue and might ruin "the company. It cannot be that either the city or Locke "intended to make an agreement of this nature, for such "a transaction would be contrary to the ordinary course "of action of rational men under similar circumstances. "The chief object of the city in the procurement of this "contract was a supply of water. The great desideratum "of the contractor was remunerative rates from private "consumers. The presumption is that the contract se- "cured both, for both parties consented to it."

*Omaha Water Co. v. Omaha,* 147 Fed. Rep. 1 p. 14.

As already pointed out, the Detroit case authoritatively ruled that such language amounted to a contract, which would confer a right on the franchise to charge up to the maximum throughout the term.

184 U. S., at pp. 386, 389.

Upon this particular point, we also invoke the *Vicksburg case*, 206 U. S., at pp. 497, 516; and we refer to the case of *Griffith v. Vicksburg Water Works Co.* (1906), 40 So. 10, 11, criticising the opposing view held in *Griffin v. Goldsbury Water Co.*, 122 N. C. 206, 30 S. E. 319, in an extract quoted with approval in the opinion of this court in the Vicksburg case.

The Omaha water case, 147 Fed. 1, *supra*, is also strictly a case wherein a provision for maximum rates in an ordinance, granting a franchise pursuant to a public sale thereof, was held to be a contract.

In the maximum rate case of *Pingree v. Michigan Central Railway Co.*, 118 Mich. 314, 76 N. W. 633, the court, having reviewed the rate cases that had been decided by this court up to that time, and having commented upon and distinguished the case of *Banking Co. v. Smith*, 128 U. S. 174, said:

"It will be noticed in the cases cited, that in no case "where a maximum rate was fixed, has the right of the "company to fix toll at that amount been denied."

Inasmuch as the learned court below, in commenting upon the Pingree case, criticised the statement just quoted on the ground that it was in conflict with what was decided in *Banking Co. v. Smith*, 128 U. S. 174, *supra*, it may not be out of place to point out that the provision as to maximum rates in the charter granted to

the Georgia Railway Company, had expired by its own limitation. On this point Mr. Justice Field said:

"The section grants to the company the exclusive "right of transportation of persons and merchandise "over its road, a right which in another part of the act "is limited to thirty-six years, and then expires unless "renewed by the legislature upon such terms as may be "prescribed by law and accepted by the company. This "period has long since expired, and we are not informed "that any renewal of the privilege has been made."

This case cannot be regarded as any exception to the universality of the statement quoted, *supra*, from the opinion in the Pingree case.

*Elements of estoppel upon city to deny the obligation of the contract as to maximum rates.*

Premising that the council of Los Angeles had the power to include as a term of this franchise, sold by it, the provision for maximum rates, as we submit has been amply shown in the divisions of this brief devoted to examination of that question under the Broughton Act and the city charter, it is proper briefly to call attention to the features of the case set forth in the bill, bearing upon the estoppel of the defendant, city, to deny its reciprocal obligation to observe the contract which fixed such maximum rates.

The city must, in reason, have known when complainant embarked in the hazardous venture of constructing a telephone system to compete with a strong and established rival already occupying the field; when it bought its franchise, among the terms and conditions of which were, the special and onerous provisions for the benefit

of the city, and paid the highest market value therefor; when it invested its capital, issued its bonds and committed itself to heavy and continuous outlay to maintain and operate its system and to compete for business, that all this was done in reliance upon the maximum rates fixed in the ordinance "B."

Complainant was willing to come under the rigid terms of the ordinance for perpetuating the competition, with all the chances involved of automatic pressure of business considerations tending to reduction of the actual rates charged, below the maximum; it was willing to take such risks as inhere in the limitation of the term, of loss upon the investment at the end thereof—but we respectfully submit that it had a right to rely upon and put faith in this engagement of the city that it would not further exercise its rate-making power after having once fixed the maximum limitation, mutual to it and the complainant.

*The case before the court is not one of enforcing collection of the maximum rates; but over the question of power on the part of the city to expose complainant to continuous harrassment and loss by depriving the complainant of the protection of its contract.*

The question now before the court is not the matter of enforcing collection by complainant of the maximum rates; for as already said complainant contracted that the rates should be open to the downward pressure of competition. But the vital question is whether the assertion of *power* here made by the city to superimpose upon these competitive conditions the added and intoi-

erable burden of an annual interference with the relations between it and its patrons by yearly rate ordinances, comports with good morals as well as with constitutional principles.

The court cannot shut its eyes to the fact, shown in the record, that the legislative power of the important city of Los Angeles is not confined to its mayor and council, but directly shared by, and ultimately in the hands of, the voting population of the city; that the council is no longer a fully deliberative or representative body, but that every member acts *in terrorem* of the recall provisions of the charter which can be wielded by 25 per cent of the registered voters; and, that it is impossible for the absolute democracy of a city of 350,000 inhabitants to be a deliberative body in any just sense of the term.

The city having acted in its business and proprietory capacity in selling this franchise and in inserting the maximum rates therein, can it in good conscience now undo in its governmental capacity, that which it agreed to in its business and proprietary capacity?

Can it be possible that the financial fate of this whole enterprise, with all its pledged faith to its bondholders, is to be wrenched from its contract moorings and cast into the municipal cauldron, to be stirred now by council —now by the populace, with the ladles of the recall, initiative and referendum?

If so, it will indeed be "fire burn and cauldron bubble," and there will be more than "double, double, toil and trouble" for the unlucky investors who put their faith in the contract.

We submit that there is here a strong case of estoppel *in pais;* and that, as was said by the Supreme Court of California in *Meyer v. Brown,* 65 Cal. 583, 589, all the members concurring, speaking by Judge Ross, now Circuit Judge in this circuit:

"It is well occasionally to recall that there is no more "reason to permit a municipal government to repudiate "obligations entered into for value, than there is to per- "mit an individual to do so. Good faith and fair dealing "should be exacted of one equally with the other."

See also:

*City Railway Co. v. Citizens St. R. R. Co.,* 166 U. S. 564, p. 566;

*Los Angeles City Water Co. v. City of Los Angeles,* 103 Fed. 711, 734, 736, 738.

If the cities of California choose to adopt freehold charter provisions of this ultra-democratic sort, then they must expect that originators of this class of public utilities will insist upon contract provisions before they embark in them; and that they will not consent to the abrogation of them, except as compelled to do so by the decisions of the tribunal that is the ultimate guardian of contract and vested rights.

IV.

**The 14th Amendment.**

Aside from the question of contract and the impairment of its obligations by the said ordinances "D," "E" and "F" in contravention of clause 1, Sec. 10, article I of the federal constitution, are the questions of less immediate interest, involving the 14th amendment to the constitution. These questions are, however, in the record, and but for such contract, would become most material to complainant's rights to the rates of compensation, established by ordinance "B."

**Constitutional Exercise of Delegated Power.**

The legislature itself may prescribe rates for a public utility corporation, or can levy a specific tax without giving any notice, for the legislature is in session at a definite time, and the theory of constitutional government is that every person must take notice of its acts.

But when the legislature delegates to a subordinate body the right to fix rates or to levy a tax, such subordinate tribunal or body must exercise discretion, must not act without investigation, and must pass judgment upon the matter in hand. This is true whether the body acts administratively, legislatively or judicially.

The appellee city bases its claim of right to regulate telephone rates solely upon the provision of section 31 of the city charter. So much of the charter as relates to the fixing of telephone rates, is as follows:

"The council shall have power by ordinance * * * "to fix and determine the charges for telephones and "telephone service and connections."

It will be seen that insofar as the charter is concerned, the common council is given power to arbitrarily fix rates without notice, hearing or investigation, and no provision is made for any review of that action.

The common council of the city has sought to remedy the defect in the charter by passing an ordinance (exhibit "C"), providing for what it deems due process of law. We may concede that, if exhibit "C" were a part of section 31 of the charter, then that charter would provide due process of law.

*The fixing of rates to be charged by public utilities corporations has often been said to be judicial in its nature, when exercised by a board or municipality.*

*San Diego Water Co. v. San Diego,* 118 Cal. 556, pp. 556 and 579;

*Spring Valley Water Works Co. v. Schottler,* 110 U. S. 347, 384;

*Chicago etc. Railway Company v. Minnesota,* 134 U. S. 418;

*Cleveland Gas Light & Coke Company v. Cleveland,* 71 Fed. 614;

*Agua Pura Company v Mayor,* 60 Pac. Rep. 208;

*L. & N. Ry. Co. v. McChord,* 103 Fed. 216, pp. 224, 225;

*Cumberland Telephone and Telegraph Co. v. Railroad Commission,* 156 Fed. 823, pp. 829, 830;

*Mercantile Trust Company v. Texas, etc.,* 51 Fed. 540, 542;

*Budd v. N. Y.,* 143 U. S. 517.

In one of the concurring opinions of the Supreme Court of California in *San Diego Water Company v. San Diego,* 118 Cal. 556, p. 579, approval is made of the following quotation from *Chicago, etc., Railway Company v. Minnesota,* 134 U. S. 418:

"If the company is deprived of the power to charge "reasonable rates for the use of its property, and such "deprivation takes place in the absence of an investiga- "tion by judicial machinery, it is deprived of the lawful "use of its property, and thus in substance and effect, "of the property itself, without due process of law, and "in violation of the constitution of the United States."

And this court in *Spring Valley Water Works Co. v. Schottler,* 110 U. S. 347, in discussing the right of the board of supervisors of the city and county of San Francisco to regulate the rates for the use of water, said:

"Like every other tribunal established by the legisla- "ture for such a purpose, their duties are judicial in their "nature, and they are bound in morals and in law to ex- "ercise an honest judgment as to all matters submitted "to their official determination."

And this court also, in *Chicago etc. Railway Company v. Minnesota,* 134 U. S. 457, in discussing the act of the state of Minnesota authorizing a commission to regulate railroad rates, as to whether said act afforded due process of law, said:

"No hearing is provided for, no summons or notice "to the company before the commission has found what "it is to find, and declared what it is to declare, no op- "portunity provided for the company to introduce wit- "nesses before the commission, in fact, nothing which "has the semblance of due process of law; and although "in the present case, it appears that, prior to the decision

"of the commission, the company appeared before it by "its agent, and the commission investigated the rates "charged by the company, for transporting milk, yet it "does not appear what the character of the investiga- "tion was, or how the result was arrived at."

It was claimed in the court below that the doctrine announced in *Chicago etc. Railway Company v. Minnesota*, 134 U. S. 418, had been modified by subsequent decisions of this court. The same claim was made in the case of *Agua Pura Company v. Mayor, etc.*, 60 Pac. Rep. 208, and we adopt the language used by the Supreme Court of New Mexico as an answer to the claim made that the doctrine of the Minnesota case had been modified. The Supreme Court of New Mexico very carefully considered the question, and it seems to us that the reasoning of the court there is unanswerable:

"It is contended by appellants that the decision in "this case was contrary to the doctrine laid down by the "Supreme Court in the case of *Munn v. Illinois*, 94 U. "S 113, 24 L. Ed. 77, and has been modified or over- "ruled by the case of *Budd v. New York*, 143 U. S. 517, "12 Sup. Ct. 468, 36 L. Ed. 247, in which the doctrine "of the Munn case was reaffirmed. But an examination "of these cases shows that such is not the effect of the "decision in the Budd case. In the Munn case it was "held that the power to regulate elevator charges was a "legislative one, and could be exercised directly by the "legislature. In *Chicago, M. & St. P. Ry Co. v. Minne- "sota*, it was held that this power could not be delegated "to a subordinate authority, such as a commission, to be "exercised without some provision for judicial determi- "nation of the reasonableness of the charges. The Su- "preme Court itself, in its opinion in the Budd case, "clearly points out this distinction. After referring to "what was decided in 134 U. S., 10 Sup. Ct. and 33 L. "Ed., as we have above quoted it, the court says (page

"546, 143 U. S., page 477, Sup. Ct., and page 256, 36 "L. Ed.): 'That was a very different case from the one "'under the statute of New York in question here, for "'in this instance the rate of charges is fixed directly "'by the legislature. * * * What was said in the "'opinion of 134 U. S., 10 Sup. Ct. and 33 L. Ed. as to "'the reasonableness of the charge being one for judi-"'cial investigation, had no reference to a case where "'the rates are prescribed directly by the legislature.' "And even as to this power the court refers to the pre-"vious case of *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. "Ct. 1028, 31 L. Ed. 841, as recognizing, upon the au-"thority of the Munn case and similar cases, the doctrine "that 'the legislature may itself fix a maximum, and be-"'yond which any charge would be unreasonable, in re-"'spect to services rendered in a public employment, or "'for the use of property in which the public has an in-"'terest, subject to the proviso that such power of lim-"'itation, or regulation is not without limit, and is not "'a power to destroy or a power to compel the doing of "'the service without reward, or to take private property "'for public use without just compensation or without "'due process of law.'"

*Agua Pura Co. v. Mayor &c.*, 60 Pac. Rep. 208.

The case of *Chicago etc. Railway Co. v. Minnesota*, 134 U S., has been more recently approved, it seems to us, by this court in *San Diego Land and Town Company v. National City*, 174 U. S. 739. The court there was considering the constitutionality of the constitution and laws of the state of California authorizing municipalities to regulate rates for water. The court referred to the Minnesota case with apparent approval and distinguished the case of *San Diego Land and Town Company v. National City, supra*, from the Minnesota case by holding that the constitution and laws of California did not invest the municipal authorities with power to fix water

rates arbitrarily without investigation, and without permitting corporations, or persons affected thereby to make any showing as to rates to be exacted, or to be heard at any time, or in any way upon the subject, and the distinction is clear. The constitution and laws of California relative to the fixing of water rates provide that the company shall in January of each year file a statement upon which the rates may be based, and the municipalities are required to fix the rates in February. In such a case the constitution and laws constitute in themselves notice to the parties to be affected, because they fix a definite time, and a definite thing to be done.

*The power to regulate rates of public utilities is akin to the power of taxation and of eminent domain, and the authorities concerning the constitutionality of acts of legislatures authorizing the levying of taxes and the condemnation of property, are in point when construing the constitutionality of an act authorizing a municipality to fix rates.*

*San Diego Water Company v. San Diego,* 118 Cal. 556, p. 567;

*Spring Valley Water W. Co. v. San Francisco,* 124 Fed., p. 594;

*Consolidated Gas Company v. New York,* 157 Fed. 809, pp. 875 and 876;

*Fallbrook Irrigation District v. Bradley,* 164 U. S. 168, p. 174.

In the Fallbrook Irrigation District case, this court was considering the validity of a statute authorizing the incorporation of an irrigation district by a board of su-

pervisors, and in deciding that case the court uses the following pertinent language:

"In view of the finding of the board of supervisors "on this question of benefits, assuming that there has "been one, this court cannot say as a matter of law that "the lands of the plaintiff in this case have not been or "cannot be benefited by this proposed irrigation. There "can be no doubt that the board of supervisors (if it "have power to hear the question of benefits, as to which "something will be said under another head of this dis-"cussion) would be a proper and sufficient tribunal to "satisfy the constitutional requirement in such case. In "speaking of a board of supervisors, Mr. Chief Justice "Waite, in *Spring Valley Water Works Company v. "Schottler*, 110 U. S. 347, 354, said: 'Like every other "'tribunal established by the legislature for such a pur-"'pose, their duties are judicial in their nature, and they "'are bound in morals and in law to exercise an hon-"'est judgment as to all matters submitted for their of-"'ficial determination. It is not to be presumed that "'they will act otherwise than according to this rule.' "In that case the board was to fix the price of water, "while in this it is to determine the fact of benefits to "lands. The principle is the same in each case."

The doctrine here announced, we believe to be based upon sound reasoning and well supported by the authorities.

Looking then to the authorities concerning legislative acts for the levying of taxes, or the condemnation of property, we find that such authorities declare that "there is a wide difference between a tax or assess-"ment prescribed by a legislative body having full au-"thority over the subject, and one imposed by a muni-"cipal corporation acting under a limited and delegated "authority, and the difference is still wider between a "legislative act making an assessment, and the act of "mere functionaries whose authority is derived from mu-

"nicipal ordinances. * * * Where the legislature has "submitted these questions for inquiry to a commission, "or to official persons to be appointed under municipal or- "dinances or regulations, the inquiry becomes in its na- "ture judicial in such a sense that the property owner is "entitled to a hearing, or to notice, or an opportunity to "be heard."

*Parsons v. District of Columbia,* 170 U. S. 47, 51, 52.

The case of *Stuart v. Palmer,* 75 N. Y. 83, seems to be a leading case on the subject, and this court in *Parsons v. District of Columbia, supra,* quoted extensively from it. with approval.

In the case of *Hagar v. Reclamation District,* 111 U. S. 701, this court was considering an act of the legislature of the state of California, and the court points out clearly the distinction between an assessment made by the legislature and one authorized to be made by officers of a municipality, and the case clearly holds that where the power is delegated to make the assessment, then notice must be given.

The act authorizing the levying of an assessment must itself provide for notice, and it is of no avail that notice is given when not provided for by the act.

*Stuart v. Palmer,* 30 Am. Rep. 291, 74 N. Y. 83;

*Kuntz v. Sumption,* 117 Ind. 1;

*Ferry v. Campbell,* 110 Iowa 290, 81 N. W. 604; same case 50 L. R. A. 92;

*Matter of Trustees of Union College,* 129 N. Y. 308, 29 N. E. 460;

*Remsen v. Wheeler,* 105 N. Y. 573, 12 N. E. 564;

*Violett v. Alexander*, 92 Va. 516, 53 Am. St. Rep. 825, 31 L. R. A. 382;
*In re Grout*, 34 Civ. Proc. R. 231, 93 N. Y., S. 711.

The doctrine announced in the foregoing cases is the law of the state of California.

*Mulligan v. Smith*, 59 Cal. 206, p. 230;
*Boorman v. City of Santa Barbara*, 65 Cal. 313;
*Hutson v. Woodbridge Protection Dist.*, 79 Cal. 90;
*Reclamation District* 531 *v. Phillips*, 108 Cal. 306;
*Brandenstine v. Hoke*, 101 Cal. 131.

In the case of *Hutson v. Woodbridge Protection District, supra*, the court decided the organization of the district to be valid, but held that the power to levy taxes, contained in the act creating the district, was unconstitutional, because it did not provide for notice or hearing. (See pp. 94 and 95.)

The case of *Boorman v. City of Santa Barbara, supra*, reviews all the authorities in the state upon the subject, and goes to the extent of overruling previous decisions, and announces the doctrine that a reclamation district, though legally organized, cannot levy a tax where the law makes no provision for notice to the owner, and no mode is provided for a hearing as to the value of his property to be assessed.

The case of *Boorman v. City of Santa Barbara, supra*, applies particularly to a city and is clearly opposed to the doctrine contended for by the appellee in this case.

There power was given to the city to open and improve streets, and it is expressly decided that an act authorizing street improvements, which does not provide for notice of the proceedings to the persons to be assessed for the expenses, is unconstitutional and void. There was a species of notice provided for in the act, but it was held insufficient. The court, instead of declaring the act unconstitutional, might well have taken the ground, if it had been upon sound principle, that the defendants take in this case, that is to say, they could have overthrown the proceeding on the ground that notice was not given, and held the act valid provided proper notice was actually given, but the court decided the act void. The decision goes to the very root of the proceeding and holds the act itself unconstitutional.

The case of *Mulligan v. Smith, supra,* is probably more yet in point. That was a case that authorized the city to open up and improve streets. The act provided that a petition should be presented to the mayor, and it was claimed that since such petition should be presented to him, he should have power to judge of its sufficiency, and the court used the following language pertinent to the question in hand:

"The legislature has no power to take away a man's "property, nor can it authorize its agent to do so, with- "out first providing for personal notice to be given to "him, *and for a full opportunity of time, place and trib- "unal, to be heard in defense of his rights. This consti- "tutional guaranty is not confined to judicial proceed- "ings, but extends to every case in which a citizen may "be deprived of life, liberty or property, whether the "proceeding be judicial, administrative or executive in "its nature.* (*Weimer v. Boneburgh,* 30 Mich. 201.)"

The case of *Brandenstine v. Hoke, supra,* is also instructive. There the law provided that upon a petition being filed with the board of supervisors of a county, it should erect certain territory into a levee district. The board of supervisors of a county is the legislative body of such municipality. The act did not provide for a notice or hearing and the Supreme Court said:

"No notice to his neighbors is *required,* no opportu-"nity for protest is allowed," and the court says that it needs no discussion to say that such an act is violative of the constitution. It was claimed that the district having been formed, it was a *de facto* district, but it was held that a void law is no law, and the district could not have any existence. The court further said:

"It is said in *Norton v. Shelby County,* 118 U. S. 442, "'An unconstitutional act is not a law, it affords no "'rights, it imposes no duties, it affords no protection, "'it creates no office; it is in legal contemplation as in-"'operative as though it had never been passed.'"

In using the above language the Supreme Court of California was dealing with the exact question here involved, so far as principle is concerned. The board of supervisors in that instance could have created due process of law as readily as a municipal council, for such board is the legislative body of the county; but it is clearly pointed out that no act can be done in aid of a void law, for a "void law is no law."

If it were necessary to produce authority that the principle announced in the foregoing cases were applicable to a charter of a city, which the appellee seems to contend is to be in some imaginary way contradistinguished from a statute conferring power upon a city,

then we are happy in having found just such a case. The provision of the charter of the city of Savannah was under investigation by the Supreme Court of Alabama, and it was claimed that the charter provision did not contain due process of law, and the court there used the following language:

"The charter is silent as to how any notice to the lot "owners of the rendition of the assessors' decision is to "be given. It contains not a single word as to when or "how the appeal is to be entered. The lot owner is left "absolutely in the dark as to these matters. The char- "ter, of course, implies that at some time or other he "should become informed that proceedings have been "instituted to condemn his property; but how is he to "ascertain this fact? So far as the statute speaks by "chance or accident only; for the municipal authorities "are not placed under the slightest obligation or duty to "give him any information whatsoever upon the subject. "We therefore do not think that the charter *by its terms,* "affords the lot owner any reasonable opportunity to "exercise the right of appeal."

*Savannah F. & W. Ry. Co. v. Mayor etc. of Savannah,* 23 S. E. 847, 848.

*The mayor and council to whom it is claimed is referred the power to fix rates in the City of Los Angeles is not an impartial tribunal, nor a freely deliberative body.*

In the case of *Spring Valley Water Works v. Schottler,* 110 U. S. 347, this court decided that the board of supervisors of the City and County of San Francisco was a proper tribunal to fix the rates of water companies doing business therein. In that case Justice Field rendered an able dissenting opinion, citing many authorities to the proposition that the tribunal was not

impartial, because they were, to some extent, judges in their own case.

Notwithstanding the early establishment of the rule in this court, as stated in *Spring Valley Water Works v. Schottler, supra,* judges throughout the country have continued to decide in rate regulating cases that a municipality should not be the judge of a reasonable rate where the municipality was itself interested in the rate to be determined.

*Cleveland Gas Light & Coke Company v. Cleveland,* 71 Fed. 610, p. 612;

*Mills v. City of Chicago,* 127 Fed. 731, p. 734;

*Agua Pura Water Co. v. Mayor, etc.,* 60 Pac. Rep. 208.

In the case of *Cleveland Gas Light and Coke Company v. Cleveland,* 71 Fed., page 612, Jackson, circuit judge with whom sat Justice Ricks, used the following language, which is pertinent here, and has an important bearing upon the question under discussion.

"The question that now faces the court is whether a "municipal corporation, itself a consumer of gas, as al- "leged in the bill, in its corporate relation to the com- "pany, to the extent of $5,000 or $6,000 per month, can, "under the legislative sanction conferred by section 2478 "of the Revised Statutes of Ohio, fix, or has the con- "stitutional right to fix, the terms or price at which it- "self and all other consumers shall pay for the gas fur- "nished. It would be a fearful proposition—monstrous- "ly absurd and outrageous—if the legislature were to "undertake to confer upon a citizen of Cleveland the "right to say at what price services should be rendered "to him, or what he should pay for goods and articles

"furnished him. There is hardly any law in this land "that would make the party being furnished the judge "of the price that he should pay, or would say that his "arbitrary decision should fix the rights of the parties. "The City of Cleveland has undertaken to do that thing "under this section No. 2478, as disclosed by the bill."

The power to fix rates, as we have said before, is akin to the power of eminent domain, and the authorities are universal that a board or body appointed to ascertain the value of property taken in eminent domain proceedings must be an impartial tribunal.

If, instead of land, which is taken by the power of eminent domain, the city should desire to acquire personal property (fuel for the public buildings of the city, paving materials for its streets, engines for its fire department, feed for its horses, or any other property for its needs) no one would pretend, independently of any law on the subject, that there would be any justice or fairness in allowing the city to fix and determine the price to be paid.

The case at bar is stronger than any other case that has been presented to the courts where it was claimed that the body appointed to fix rates was not an impartial tribunal.

In the City of Los Angeles, the charter provides that any councilman may be recalled and be required to stand for another election by a petition signed by electors entitled to vote for a successor to the incumbent sought to be removed equal in number to twenty-five per centum of the entire vote for all candidates for the office, cast at the election at which he was elected, and this recall

provision of the charter may be put into force without any charge of incompetency against the incumbent.

*City Charter*, section 198 C;
*In re Andrew Pfahler*, 150 Cal. 71.

Let us assume for the sake of argument, and as an illustration of the effect of the recall provision upon the power to fix rates, when the question of fixing rates for telephones was called for hearing by the common council of the City of Los Angeles, one of the councilmen arose and said:

"The case is simply this: my people do not want the "'phone rates raised. I feel very certain that they would "recall me if I voted for an increase. So it is wasting "the time of the company and the council to talk about "it. There is no use of our pretending to make an in-"vestigation to offer to give these people a square deal "when the verdict is written before the case is called."

Under such an assumed case, would this court think such a councilman a proper person to fix rates, and should not a provision in a charter which brought about such a condition be regarded as the very best argument that the charter of the City of Los Angeles does not afford due process of law? If, however, a city council should pass an ordinance that was satisfactory to the company, the people themselves, by what is known as the referendum provision of the charter, might revoke the action of the council. City Charter, section 198b.

If the charter was intended to give the city power to regulate rates and not to contract in a franchise fixing rates, then the provision of the charter, known as the initiative, gives to the people themselves, the voters of the city, power to fix by ordinance the rates. (City

charter of Los Angeles, section 198a.) This provision of the charter provides that upon a petition of fifteen per cent. of the voters of the city, any ordinance may be submitted to the people, and be adopted and thus become a law, and therefore, according to the city charter, the voters themselves can fix by ordinance the telephone rates. It cannot be comprehended how the people themselves could make an investigation or pass impartially upon the question.

All the councilmen are users of telephones. The city itself is a user, and every councilman is subject to be recalled by his constituency if he does not do their bidding in the fixing of these rates, or in lieu of recalling him, fifteen per cent. of the people may appeal from the adoption of the ordinance of the council, and recall or annul any ordinance they establish, or, if the council did not establish an ordinance to suit the users of the telephones, then they could initiate an ordinance fixing the price to suit themselves.

There will always be a great pressure upon the council by the people who elect them to regulate the price of telephones, without regard to the interests of the company. The influence thus exerted to warp the judgment of the members, and change the character of the body from that of an impartial tribunal to one acting in the interests of its constituents, every practical man dealing with a corporation would appreciate and act upon. All the influences usually brought to bear at elections to secure the choice of those who will carry out the wishes of the voters we would expect to see applied to the elec-

tion of candidates thus empowered to fix the price of the articles which the voters daily use.

If we investigate the provisions of the city charter by which these rates may be regulated by a council under the domination, by reason of the recall provision of the charter, of the users of the telephones, or by which the rates may be fixed by the users themselves, we can see at once that the charter provides for the confiscation of property. It is natural justice, recognized as such from the earliest times, that it takes two parties to make a contract; that no man has a right to take another man's property without just compensation, to be agreed upon between the parties, not fixed by one of the parties; or, where it is taken for public use, then to be fixed by a disinterested tribunal. Here, under the city charter the people have a right to fix a price upon the service without consultation with the company at all.

It is vain to say that the company can appeal to the courts for justice. So a man whose horse is taken may appeal to the courts, but what good will it do the man whose horse is taken to appeal to the courts, if the next minute after he makes a successful appeal to the courts, the municipality who took his horse can take it again, without paying damages for the previous taking, and thus continue to take it until he is driven to desperation and deprived of the use of his property? The courts will say they cannot fix a rate when they adjudge that a rate fixed by the legislature or a commission is unjust. Then what good is it to a company to appeal to the courts to have a rate set aside when the users of the telephone may annul the court's decision by at once fixing

another unjust rate and claiming that conditions have changed? The rates are to be fixed, so the decisions say, upon the value of the property, but the value of the property is destroyed by the users of the telephone harrassing the company by fixing rates. The value of the property consists largely in the rates received from the users. If the users are to fix the value of the service under this charter, and then the company goes into litigation with them, it destroys the good will of its customers toward it; but there is no method by which a court can compel them to pay a reasonable rate, or to quit fixing an unreasonable rate.

Whether the claim made is correct or not as to whether a council acts judicially in fixing rates, and it seems that the claim is supported by good authority, it certainly is an important fact for a court to take into consideration, that a common council of a city is composed of the citizens of the city which is using the telephone, and each member of the council is a user, or has the right to the use of a telephone, and in fixing the rates he would be acting in his own cause.

It has been suggested that in California the courts recognize a right to appeal to a court where the rate fixed is unreasonable. This argument we do not think sound. Section 31 of the city charter gives no right to appeal to any court. The right is not given by virtue of any statute or charter provision, nor does it exist in the sense in which that expression is understood. Where the rates fixed are confiscatory, the constitution of the United States affords the protection, and it is not by virtue of any law of the state of California. There is

no remedy given by the charter for an unjust rate fixed. The only remedy that exists is that under the constitution of the United States, which under the construction given to it by this court provides that if the rate fixed confiscates, or is so grossly and palpably unreasonable and unjust as to amount to practical confiscation, a court will set the rate aside, as violative of the constitution.

*The provisions of the city charter and the proceedings of the council thereunder abridge the privileges and immunities of the complainant, and deprive it of the equal protection of the law.*

In the state of California, there are organized and in operation numerous classes of public service corporations, engaged in various lines of business authorized by its laws,—steam railroads, street railroads, water companies, electric light and power corporations, corporations for the purpose of furnishing gas for heating and lighting purposes, telephone and telegraph corporations.

Throughout the state, the operations of these various corporations are being carried on, some of them wholly within the limits of municipalities, and others, owing to their very nature, extending throughout the state or portions of the state.

The complainant corporation, as shown by the bill, is a telephone and telegraph corporation, authorized under the law to do business generally in this state and in others.

Like a steam railroad, it has power to act as a common carrier, not only within municipalities, but between the various cities and towns, and throughout the various

counties of the state. The carrying on of its business as a common carrier may relate to or concern the inhabitants of one city alone, or it may be a common carrier as between the various localities. In its business and operations, therefore, it is important that no one municipality should have authority to so curtail its privileges as to operate to the detriment of other cities or localities.

Under the constitution, our laws must have a general and uniform operation, unless by reason of some special or local condition, a local or special law is made necessary.

(a) *A classification by which the power to fix rates for a telephone company is given to a municipality, is denying equal protection of the law.*

The power of the legislature to classify in the enactment of general laws, as distinguished from local and special legislation, must be founded upon differences which are either defined by the constitution or which are natural and will suggest a reason which may rationally be held to justify the diversity in the legislation.

Classification must not be arbitrary for the mere purpose of classification, or in order that legislation, really local or special, may seem to be general; but must be for the purpose of meeting different conditions naturally requiring different legislation.

*Darcy v. Mayor &c. of San Jose,* 104 Cal. 642.

Classification of cities for the purpose of eminent domain, so that procedure in one city is different from that of another, is in violation of the constitution of Califor-

nia, providing that all laws of a general nature shall have uniform operation, and that the legislature shall not pass local or special laws in cases where a general law may be made applicable.

*Pasadena v. Stimson*, 91 Cal. 238, pp. 248 *et seq.*

While the foregoing cases are construing the statutes and the constitution of the state of California as to the right to pass special or local laws, they are authority declaring what is equal protection of the law; for under this provision of the constitution of the United States, the same classification is required that is demanded by the state constitution, which requires that no local or special law shall be passed where a general law may be made applicable.

The constitution of the state of California recognizes that the rates for telephone companies may be regulated by uniform law. We refer to section 33 of article 4 of the constitution of California, which provides:

"[The legislature shall pass laws for the regulation "and limitation of the charges for services performed "and commodities furnished by telegraph and gas cor- "porations," etc.

This section of the constitution applies only to gas corporations which were in existence at the time of the adoption of the constitution and such corporations doing business in cities having a municipal gas plant. In considering this section of the constitution, the learned judge in the court below inadvertently overlooked section 19 of article II of the constitution, which provides that gas companies may have a perpetual franchise in municipalities "upon the condition that the municipal

"government shall have the right to regulate the charges "therefor.]"

If a commission were formed by the state legislature and given power to regulate rates throughout the state, then capital invested in one city could receive the same returns as capital invested in another city.

If rates are to be regulated for a company doing business in many cities, by each city, it will be practically impossible to fix uniform rates for the inhabitants of each city, and at the same time pay due regard to the proportionate part of the capital invested in each such city.

A sovereign power of such high perogative character, involving the welfare of all the citizens of the state as well as the corporations which may be subject to it, should never be allowed to be exercised piecemeal throughout the sovereignty. It is a right common to all, and should be exercised for or against all, or it should never be enforced against any.

In the various cases where classification for legislation has been allowed, we believe no classification can be found, made upon the basis of application to a given locality unless the peculiar and local conditions justified the discrimination.

In Missouri it has been decided that it is not proper to confer upon a municipality power to regulate telephone rates, on the ground that the exercise of such power is not local in its nature.

*State v. Missouri & Kansas Telephone Company,*
189 Mo. 83; 88 S. W. 41, p. 42.

The authorities construing the constitution, we believe, fully support the foregoing observations.

*Guthrie on the Fourteenth Amendment,* 110, 111, 114;

*Gulf C. & S. F. R. Co. v. Ellis,* 165 U. S. 150, 160;

*Cotting v. Kansas City Stockyards Co.,* 183 U. S. 79, pp. 105 *et seq.;*

*Builders Supply Depot v. O'Connor,* 150 Cal. 265.

(b) *Classifying companies by name for rate regulation purposes is not a proper classification.*

"Every one has a right to demand that he be gov-"erned by general rules, and a special statute which, "without his consent, singles his case out as one to be "regulated by a different law from that which is applied "in all similar cases, would not be legitimate legislation, "but would be such an arbitrary mandage as is not with-"in the province of free governments. Those who make "the laws 'are to govern by promulgated, established "'laws, not to be varied in particular cases, but to have "'one rule for rich and poor, for the favorite at court "'and the countryman at plough.' This is a maxim in "constitutional law, and by it we may test the authority "and binding force of legislative enactments." * * *

*Cooley's Constitutional Limitations,* 484, 486-7.

"Every partial or private law which directly proposes "to destroy or affect individual rights, or does the same "thing by affording remedies leading to similar conse-"quences, is unconstitutional and void. Were this other-"wise, odious individuals and corporate bodies would be "governed by one rule, and the mass of the community "which made the law, by another.

"In *Stratton v. Morris,* 88 Tenn. 497, Baxter, special "judge, reviewing at some length cases of classification, "closed the review with these words:

"'We conclude upon a review of the cases referred "'to above, that whether a statute be public or private, "'general or special in form, if it attempts to create dis- "'tinctions and classifications between the citizens of this "'state, the basis of such classification must be natural "'and not arbitrary.'"

*Gulf C. & S. F. R. Co. v. Ellis, supra,* 165 U. S. 150, 155.

"It cannot be just, it cannot be equality of right or of "protection, for an act to be unlawful if done by one "railroad in Kentucky, and lawful if done by another "railroad in the same state."

*L. & N. R. C. v. McChord,* 103 Fed. 216.

Following the principles announced by the foregoing authorities and many others that might be cited, we think the conclusion is inevitable that an ordinance which aims solely at one corporation or is intended to control the rates of one corporation simply by name, is not an ordinance that can be upheld under the constitution. If such an ordinance can be upheld, then it would be lawful for the municipality to regulate one telephone company and not the other.

In this case, the rates allowed the Home Telephone Company are not so great. Besides, the ordinances give to the Sunset Telephone Company the right to make several specified charges that are not allowed to the Home. For instance, the Sunset Company is permitted to install a business 'phone, limited to one hundred calls, at five dollars per month and two cents for each additional call. That sort of service, furnished by the Home Telephone Company, would be a penal offense. And so the same argument will apply to the ordinances throughout.

In this case is an ordinance prescribing rates for the Home Telephone Company, passed in 1906 (exhibit "D"); and an ordinance prescribing rates for the Sunset Telephone Company, passed in 1906 (exhibit "E"); an ordinance prescribing rates for the Home Telephone Company, passed in 1907 (exhibit "E"); and an ordinance prescribing rates for the Sunset Telephone Company, passed in 1907 (exhibit "G").

These ordinances discriminate most radically against the Home Telephone Company, and in favor of the Sunset Telephone Company.

For the convenience of the court, we give the substance of the charges allowed to each company, as set forth in these four ordinances. First, the ordinances passed in 1906:

| HOME TELEPHONE COMPANY. (Exhibit "D.") | SUNSET TELEPHONE COMPANY. (Exhibit "E.") |
|---|---|
| 1. Unlimited service, business telephone, $5.00 per month. | 1. Unlimited service, business telephone, $8.00 per month. |
| ——— | 2. Business 'phone limited to 100 calls, $5.00 per month, and 2c for each additional call. |
| ——— | 3. Two-party line, unlimited, $4.00 per month. |
| ——— | 4. Four-party line, unlimited, $3.00 per month. |
| 2. Residence, independent, individual circuit, un- | 5. Residence, independent, individual circuit, un- |

limited, $2.00 per month.

———

3. Extension telephone, $1.00 per month.

4. Private exchange, $5.00 per month for first circuit; $4.00 for each additional circuit; and for each telephone station, $1.00 per month.

limited, $3.00 per month.

6. Four-party line, $1.50 per month.

7. Extension telephone, $1.00 per month.

8. Private exchange, $8.00 per month for first circuit; $6.00 for each additional circuit; and for each telephone station, $1.00 per month.

Second, the ordinances passed in 1907:

HOME TELEPHONE COMPANY.

(Exhibit "F.")

1. Unlimited service, business telephone, $5.00 per month.

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2. Residence, independent, individual circuit, unlimited, $2.00 per month.

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SUNSET TELEPHONE COMPANY.

(Exhibit "G.")

1. Unlimited service, business telephone, $5.00 per month.

2. Business 'phone, limited to 100 calls, $5.00 per month, and 2c for each additional call.

3. Two-party line, unlimited, $4.00 per month.

4. Four-party line, unlimited, $3.00 per month.

5. Residence, independent, individual circuit, unlimited, $3.00 per month.

6. Four-party line, $1.50 per month.

3. Extension telephone, $1.00 per month.

4. Private exchange, $4.00 per month for first circuit; $1.00 for each additional circuit; and for each telephone station, $1.00 per month.

7. Extension telephone $1.00 per month.

8. Private exchange, $8.00 per month for first circuit, $6.00 for each additional circuit; and for each telephone station, $1.00 per month.

Arbitrary exercise of the police power which tends to build up one company at the expense of a rival, will be restrained by the courts.

*Dobbins v. Los Angeles,* 195 U. S. 223, p. 238.

We respectfully submit that the decree of the court below should be reversed, and the cause remanded for further proceedings.

OSCAR A. TRIPPET,
*Solicitor for Appellant.*

A. HAINES,
*Of Counsel for Appellant.*

## SUPPLEMENT.

AN ACT PROVIDING FOR THE SALE OF RAILROAD AND OTHER FRANCHISES IN MUNICIPALITIES, AND RELATIVE TO GRANTING OF FRANCHISES.

(Approved March 23, 1893.)

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate railroads along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by the Board of Supervisors, Common Council or other governing or legislative body of any county, city and county, city, town, or district within this state, shall be granted upon the conditions in this act provided, and not otherwise. The fact that an application for such franchise or privilege has been made to such board of supervisors, common council, or other governing or legislative body, together with a statement that it is proposed to grant the same, must first be advertised in one or more daily newspapers of the county, city and county, city, town, or district wherein the said franchise or privilege is to be exercised. Such advertisement must continue every day for at least ten days, and must commence at least thirty days before any further action of the board of supervisors, common council, or other governing or legislative body. The advertisement must state the character of the franchise or privilege proposed to be granted, the term of its continuance, and, if a street railroad, the route to be traversed, and the day on which tenders will be received for the same. On the day so stated,

the board, or other governing or other legislative body herein mentioned, must meet in open session and read the tenders. The franchise or privileges must then be awarded to the highest bidder, provided, however, that nothing in this section shall affect a special privilege granted for a shorter term than two years.

Sec. 2. Any member of any Board of Supervisors, Common Council, or other governing or legislative body of any county, city and county, city, town, or district of this State, who, by his vote, violates or attempts to violate the provisions of this Act, or any of them, shall be guilty of a misdemeanor and of malfeasance in office, and be deprived of his office by the Decree of a court of competent jurisdiction, after trial and conviction.

Sec. 3. This Act shall take effect immediately.

AN ACT TO AMEND AN ACT ENTITLED "AN ACT PROVIDING FOR THE SALE OF RAILROAD AND OTHER FRANCHISES IN MUNICIPALITIES, AND RELATIVE TO GRANTING OF FRANCHISES," APPROVED MARCH 23, 1893, BY AMENDING SECTION ONE OF SAID ACT.

(Approved March 19, 1897.)

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Section 1. Section one of an Act providing for the sale of railroad and other franchises in municipalities, and relative to granting of franchises, approved March twenty-third, eighteen hundred and ninety-three, is hereby amended to read as follows:

Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate railroads along or upon any public street, or highway, or to exercise any other privilege whatever hereafter proposed to be granted by the Board of Supervisors, or other governing or legislative body of any county or district within this state, except renewals of franchises or privileges for wharves, chutes, or piers, in counties outside of the limits of incorporated cities or towns, shall be granted upon the conditions in this Act provided, and not otherwise. The fact that an application for such franchise or privilege has been made to such Board of Supervisors or other governing or legislative body, together with a statement that it is proposed to grant the same, must first be advertised in one or more daily newspapers in the county or district wherein the said fran-

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chise or privilege is to be exercised. If there be no daily newspaper published in the district wherein the said franchise or privilege is to be exercised, then the publication must be made in some other daily newspaper of the county, and if there be no daily newspaper published in the county wherein the said franchise or privilege is to be exercised, then the publication must be made in a daily newspaper published in an adjoining county. Such advertisements must continue every day for at least ten days, and must commence at least thirty days before any further action of the Board of Supervisors or other governing or legislative body. The advertisement must state the character of the franchise or privilege proposed to be granted, the term of its continuance, and, if a street railroad, the route to be traversed, and the day on which tenders will be received for the same. On the day so stated, the board or other governing or legislative body herein mentioned, must meet in open session and read the tenders. The franchise or privileges must then be awarded to the highest bidder; provided, however, that nothing in this section shall affect a special privilege granted for a shorter term than two years.

**Broughton Act.**

"AN ACT PROVIDING FOR THE SALE OF STREET RAILROAD AND OTHER FRANCHISES IN MUNICIPALITIES, AND PROVIDING CONDITIONS FOR THE GRANTING OF SUCH FRANCHISES BY LEGISLATIVE OR OTHER GOVERNING BODIES, AND REPEALING CONFLICTING ACTS.

(Became a Law Mar. 11, 1901.)

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any city and county, city or town within this state, except steam railroads, and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise.

Sec. 2. An applicant for any franchise or privilege above mentioned shall file with the governing or legislative body of the municipality an application, and thereupon said governing body shall, in its discretion, and when the application is accompanied with a petition praying that the same be granted, signed by the owners of three-fourths of the frontage of the real property

fronting along and upon the route of the franchise applied for, must advertise the fact of said application, together with a statement that it is proposed to grant the same, in one or more newspapers of the city and county, city or town wherein the said franchise or privilege is to be exercised. Said advertisement must state that bids will be received for such franchise, and that it will be awarded to the highest bidder, and the same must be published in such newspaper once a day for ten successive days, if it be a daily newspaper, and if there be no daily paper published in such city and county, city or town, then it shall be published in a weekly newspaper once a week for four successive weeks, and in either case the full publication must be completed not less than twenty (20) nor more than thirty (30) days before any further action can be taken thereon.

Sec. 3. The publication must state the character of the franchise or privilege proposed to be granted, the term for which it is granted, and, if it be a street railroad, the route to be traversed; that sealed bids therefor will be received up to a certain hour and day named therein, and that the successful bidder and his assigns must, during the life of said franchise, pay to the municipality two per cent. (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession. No percentage shall be paid for the first five (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable annually; and in the event said payment is not made, said franchise shall be forfeited; provided further, that if the franchise

be a renewal of a right already in existence, the payment of said percentage of gross receipts shall begin at once.

Sec. 4. In case the franchise granted shall be an extension of an existing system of street railroad, then the gross receipts shall be estimated to be one-half of the proportion of the total gross receipts of said system which the mileage of such extension bears to the total mileage of the whole system, and said estimate shall be conclusive as to the amount of the gross receipts of said extension.

Sec. 5. Said advertisement shall also contain a statement that the said franchise will be granted to the person, firm or corporation who shall make the highest cash bid therefor; provided only that at the time of the opening of said bids any responsible firm or corporation present, or represented, may bid for said franchise or privilege a sum not less than ten per cent. above the highest sealed bid therefor, and said bid, so made, may be raised ten per cent. by any other responsible bidder present, and said franchise or privilege shall finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States, and said successful bidder shall be required to deposit with said governing body, or such person as it may direct, the full amount of his or its said bid, within twenty-four hours thereafter; and in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the next highest bidder therefor.

Sec. 6. Work to erect or lay telegraph or telephone wires, to construct street railroads, to lay gas pipes for the purpose of carrying gas for heat and power, to erect

poles or wires for transmitting electric heat or power, along or upon any public street or highway, or to exercise any privilege whatever, a franchise for which shall have been granted in accordance with the terms of this act, shall be commenced in good faith within not more than four months from the granting of any such franchise, and if not so commenced within said time said franchise so granted shall be declared forfeited and shall be completed within not more than three years thereafter, and if not so completed within said time said franchise so granted shall be forfeited; provided, that for good cause shown the governing or legislative body may by resolution extend the time for completion thereof, not exceeding three months.

Sec. 7. The grantee of every franchise or privilege granted under this act shall file a bond running to said city and county, city or town, with at least two good and sufficient sureties to be approved by such governing body, in a penal sum by it to be prescribed and set forth in the advertisement for bids, conditioned that such bidder shall well and truly observe, fulfill, and perform each and every term and condition of such franchise, and that in case of any breach of condition of such bond, the whole amount of the penal sum therein named shall be taken and deemed to be liquidated damages, and shall be recoverable from the principal and sureties upon said bond. Said bond shall be filed with such governing body within five days after such franchise is awarded, and in case said bond shall not be so filed, the award of such franchise shall be set aside, and the same may be granted to the next lowest bidder, or again offered for

sale, in the discretion of said governing body.

Sec. 8. It shall be the duty of the attorney-general, upon the complaint of any municipality, or, in his discretion, upon the complaint of any tax-payer, to sue for the forfeiture of any franchise granted under the terms of this act, for the non-compliance with any condition thereof.

Sec. 9. No clause or condition of any kind shall be inserted in any franchise or grant offered or sold under the terms of this act, which shall directly or indirectly restrict free and open competition in bidding therefor, and no clause or provision shall be inserted in any franchise offered for sale, which shall in anywise favor one person, firm or corporation, as against another, in bidding for the purchase thereof.

Sec. 10. Any member of any common council or other governing or legislative body of any city and county, city or town of this state, who, by his vote, violates or attempts to violate the provisions of this act, or any of them, shall be guilty of a misdemeanor, and may be punished therefor, as provided by law, and may be deprived of his office by the decree of a court of competent jurisdiction, after trial and conviction.

Sec. 11. All acts or parts of acts in conflict herewith are hereby repealed; provided, however, that nothing herein contained shall be construed as repealing or amending the following acts, to-wit: "An act relating "to the granting by the counties and municipalities of "franchise for the construction of paths and roads for "the use of bicycles and other horseless vehicles," approved March twenty-seventh, eighteen hundred and

ninety-seven; "An act to authorize cities and towns to "grant franchises for the construction and maintenance "of railroads beyond the limits of such cities or towns "leading to public parks owned thereby," being chapter forty of the laws of eighteen hundred and ninety-seven of the state of California.

This act shall take effect immediately.

AN ACT PROVIDING FOR THE SALE OF STREET RAILROAD AND OTHER FRANCHISES IN COUNTIES AND MUNICIPALITIES, AND PROVIDING CONDITIONS FOR THE GRANTING OF SUCH FRANCHISES BY LEGISLATIVE OR OTHER GOVERNING BODIES, AND REPEALING CONFLICTING ACTS.

(Approved March 22, 1905.)

The People of the State of California, represented in Senate and Assembly, do enact as follows:

Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any county, city and county, city or town within this state, except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise.

Sec. 2. An applicant for any franchise or privilege above mentioned shall file with the governing or legislative body of the county or municipality an application, and thereupon said governing body shall, in its discretion, advertise the fact of said application, together with a statement that it is proposed to grant the same, in one or more newspapers of the county, city and

county, city or town wherein the said franchise or privilege is to be exercised. Said advertisement must state that bids will be received for such franchise, and that it will be awarded to the highest bidder, and the same must be published in such newspaper once a day for ten successive days, if it be a daily newspaper, and if there be no daily newspaper published in such county, city and county, city or town, then it shall be published in a weekly newspaper once a week for four successive weeks, and in either case the full publication must be completed not less than twenty nor more than thirty days before any further action can be taken thereon.

Sec. 3. The publication must state the character of the franchise or privilege proposed to be granted, the term for which it is granted, and, if it be a street railroad, the route to be traversed; that sealed bids therefor will be received up to a certain hour and day named therein, and that the successful bidder and his assigns must, during the life of said franchise, pay to the county or municipality two per cent. (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession. No percentage shall be paid for the first five (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable annually; and in the event said payment is not made, said franchise shall be forfeited; *provided further*, that if the franchise be a renewal of a right already in existence, the payment of said percentage of gross receipts shall begin at once.

Sec. 4. In case the franchise granted shall be an ex-

tension of an existing system of street railroad, then the gross receipts shall be estimated to be one-half of the proportion of the total gross receipts of said system which the mileage of such extension bears to the total mileage of the whole system, and said estimate shall be conclusive as to the amount of the gross receipts of said extension.

Sec. 5. Said advertisement shall also contain a statement that the said franchise will be struck off, sold and awarded to the person, firm or corporation who shall make the highest cash bid therefor; *provided, only*, that at the time of the opening of said bids any responsible person, firm or corporation present or represented may bid for said franchise or privilege a sum not less than ten per cent. above the highest sealed bid therefor, and said bid so made may be raised not less than ten per cent. by any other responsible bidder, and said bidding may so continue until finally said franchise shall be struck off, sold, and awarded by said governing body to the highest bidder therefor in gold coin of the United States. Each sealed bid shall be accompanied with cash or a certified check, payable to the treasurer of such county or municipality, for the full amount of said bid, and no sealed bid shall be considered unless said cash or check is enclosed therewith and the successful bidder shall deposit, at least ten per cent. of the amount of his bid with the clerk of such county or municipality before the franchise shall be struck off to him. And if he shall fail to make such deposit immediately, then and in that case, his bid shall not be received, and shall be considered as void, and the said franchise shall then and there

be again offered for sale to the bidder who shall make the highest cash bid therefor, subject to the same conditions as to deposit, as above mentioned. Said procedure shall be had until said franchise is struck off, sold, and awarded to a bidder who shall make the necessary deposit of at least ten per cent of the amount of his bid therefor, as herein provided. Said successful bidder shall deposit with the clerk of such county or municipality, within twenty-four hours of the acceptance of his bid, the remaining ninety per cent. of the amount thereof, and in case he or it shall fail to do so, then the said deposit theretofore made, shall be forfeited, and the said award of said franchise shall be void, and the said franchise shall then and there, by said governing body, be again offered for sale to the highest bidder therefor, in the same manner, and under the same restriction as hereinbefore provided, and in case said bidder shall fail to deposit with the clerk of such county or municipality, the remaining ninety per cent. of his bid, within twenty-four hours after its acceptance, the award to him of said franchise shall be set aside, and the deposit theretofore made by him shall be forfeited, and no further proceedings for a sale of said franchise shall be had unless the same shall be readvertised and again offered for sale, in the manner hereinbefore provided.

Sec. 6. Work to erect or lay telegraph or telephone wires, to construct street railroads, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat or power, along or upon any public street or highway, or to exercise any privilege whatever, a franchise for which

shall have been granted in accordance with the terms of this act, shall be commenced in good faith within not more than four months from the granting of any such franchise, and if not commenced within said time said franchise so granted shall be declared forfeited, and shall be completed within not more than three years thereafter, and if not so completed within said time said franchise so granted shall be forfeited; *provided*, that for good cause shown the governing or legislative body may by resolution extend the time for completion thereof, not exceeding three months.

Sec. 7. The successful bidder for any franchise or privilege struck off, sold, and awarded under this act shall file a bond running to said county, city and county, or city or town, with, at least, two good and sufficient sureties, to be approved by such governing body, in a penal sum by it to be prescribed, and set forth in the advertisement for bids, conditioned that such bidder shall well and truly observe, fulfill and perform each and every term and condition of such franchise, and that in case of any breach of condition of such franchise, and that in case of any breach of condition of such bond, the whole amount of the penal sum therein named shall be taken and deemed to be liquidated damages, and shall be recoverable from the principal and sureties upon said bond. Said bond shall be filed with such governing body within five days after such franchise is awarded, and upon the filing and approval of such bond, the said franchise shall, by said governing or legislative body, be granted by ordinance to the person, firm or corporation to whom it has been struck off, sold, or awarded, and in

case that said bond shall not be so filed, the award of such franchise shall be set aside, and any money paid therefor shall be forfeited, and said franchise shall, in the discretion of said governing or legislative body, be readvertised, and again offered for sale in the same manner, and under the same restrictions, as hereinbefore provided.

Sec. 8. It shall be the duty of the attorney-general, upon the complaint of any county or municipality, or, in his discretion, upon the complaint of any taxpayer, to sue for the forfeiture of any franchise granted under the terms of this act, for the non-compliance with any condition thereof.

Sec. 9. No clause or condition of any kind shall be inserted in any franchise or grant offered or sold under the terms of this act, which shall directly or indirectly restrict free and open competition in bidding therefor, and no clause or provision shall be inserted in any franchise offered for sale, which shall in any wise favor one person, firm or corporation, as against another, in bidding for the purchase thereof.

Sec. 10. Any member of any common council or other governing or legislative body of any county, city and county, city or town of this state, who, by his vote, violates or attempts to violate the provisions of this act, or any of them, shall be guilty of a misdemeanor, and may be punished therefor, as provided by law, and may be deprived of his office by the decree of a court of competent jurisdiction, after trial and conviction.

Sec. 11. All acts or parts of acts in conflict herewith are hereby repealed; *provided, however,* that nothing

herein contained shall be construed as repealing, or amending the following acts, to-wit: "An act relating "to the granting by the counties and municipalities of "franchise for the construction of paths and roads for "the use of bicycles and other horseless vehicles," approved March twenty-seventh, eighteen hundred and ninety-seven; "An act to authorize cities and towns to "grant franchises for the construction and maintenance "of railroads beyond the limits of such cities or towns "leading to public parks owned thereby," being chapter forty of the laws of eighteen hundred and ninety-seven of the state of California.

This act shall take effect immediately.

## In Memoriam

A. B. McCutchen Esq., whose name appears in the record of this cause as one of the counsel for complainant died pending this appeal. His last professional work was done in preparation of this argument and whatever is in it which tends to elucidate the questions involved is largely due to him.

His fellow counsel in this cause, with mournful regret that his untimely death has prevented his appearing in this great court to be a worthy member of which is the honorable ambition of every true American lawyer, take this opportunity of associating with the evidence of his last labors, their testimony to his high character, and their tribute of tender affection for his manly and lovable personality.

# Supreme Court of the United States.

OCTOBER TERM, 1906.

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Home Telephone and Telegraph Company,

*Appellant*

vs.

The City of Los Angeles, a municipal corporation, Henry T. Hazard, as Treasurer of said City, Members of the Common Council of said City,

*Appellees*

No. 178.

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APPEAL FROM THE CITY OF LOS ANGELES FROM WANT OF JURISDICTION.

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# CHARTER

OF THE

# CITY OF LOS ANGELES

As Adopted January, 1889

Amended January, 1903

Amended January, 1905

and

Amended February, 1907

PUBLISHED BY

PARKER & STONE CO., LAW PRINTERS

238 NEW HIGH STREET

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OF THE

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# Charter of the City of Los Angeles

## ARTICLE I.

### INCORPORATION AND POWERS.

Section 1. The municipal corporation now existing and known as "The City of Los Angeles," shall continue to be a municipal corporation under the same name and with the same boundaries that it now has, to wit:

Beginning at a cement monument in the County of Los Angeles, State of California, said monument being set on the township line between township one south, range fourteen west, and township two south, range fourteen west, San Bernardino Base and Meridian; said monument being 8094.61 feet from the common corner to township one south, range thirteen west, township one south, range fourteen west, township two south, range thirteen west, and township two south, range fourteen west, San Bernardino Base and Meridian; thence from said point of beginning north 0 degrees 07 minutes 00 seconds west, 2644.49 feet to a point; thence north 0 degrees 06 minutes 30 seconds west 2640.89 feet to a point; thence north 0 degrees 16 minutes 30 seconds west, 2641.80 feet to a point; thence north 0 degrees 05 minutes 00 seconds west, 2827.62 feet to a point; thence south 88 degrees 20 minutes 30 seconds east, 180.04 feet to a point; thence south 89 degrees 53 minutes 30 seconds east, 2638.-46 feet to a point; thence north 89 degrees 39 minutes 30 seconds east, 5282.98 feet to a point; thence north 0 degrees 05 minutes 30 seconds west, 5107.53 feet to a point; thence south 89 degrees 57 minutes 15 seconds east, 2206.69 feet to a point on the West Patent Boundary line of the City of Los Angeles, as per

map recorded in Book 2 of Miscellaneous Records of the County of Los Angeles, California, at pages 504 and 505 thereof; thence along said West Patent Boundary line north 0 degrees 24 minutes 00 seconds west, 7087.80 feet to the northwest corner of the City of Los Angeles, as per map aforesaid; thence along the North Patent Boundary line of the City of Los Angeles, as per map aforesaid, south 89 degrees 34 minutes 30 seconds east 13,278.36 feet to a point; thence continuing along said North Patent Boundary line south 89 degrees 20 minutes 15 seconds east, 6826.16 feet to a point; thence north 187.03 feet to a point; thence north 39 degrees 28 minutes 00 seconds east, 2130.20 feet to a point; thence north 4 degrees 40 minutes 00 seconds east, 1188.40 feet to a point; thence north 11 degrees 43 minutes 00 seconds east, 1627.80 feet to a point; thence north 59 degrees 16 minutes 30 seconds east, 2021.40 feet to a point; thence north 34 degrees 42 minutes 30 seconds west, 37.50 feet to a point; thence north 89 degrees 34 minutes 30 seconds east, 9.01 feet to a point; thence north 34 degrees 40 minutes 30 seconds west, 375.54 feet to a point; thence north 58 degrees 44 minutes 30 seconds east, 392.23 feet to a point; thence north 79 degrees 12 minutes 00 seconds east, 206.58 feet to a point; thence south 89 degrees 03 minutes 00 seconds east, 487.08 feet to a point; thence north 53 degrees 57 minutes 00 seconds east, 562.80 feet to a point; thence north 89 degrees 21 minutes 00 seconds east, 1008.00 feet to a point; thence south 0 degrees 39 minutes 15 seconds east, 47.87 feet to a point; thence north 59 degrees 22 minutes east, 1584.52 feet to a point; thence north 12 degrees 04 minutes 15 seconds east, 1714.26 feet to a point; thence north 89 degrees 59 minutes 30 seconds east, 942.00 feet to a point; thence north 89 degrees 56 minutes 30 seconds east, 3674.92 feet to a point; thence north 89 degrees 50 minutes east, 1174.63 feet to a point; thence south 36 degrees 15 minutes 15 seconds west, 629.95 feet along the center line of Avenue 66 (formerly Cooper Avenue) to a point; thence south 53 degrees 55 minutes east, 299.50 feet

to a point; thence south 36 degrees 16 minutes 15 seconds west, 900.50 feet to a point; thence south 53 degrees 28 minutes east, 280.28 feet to a point; thence south 51 degrees 41 minutes 15 seconds west, 1205.69 feet along the center line of San Pasqual avenue to a point; thence south 22 degrees 00 minutes 45 seconds east, along the boundary line of the San Rafael Rancho, 463.17 feet to a point; thence south 34 degrees 15 minutes west, 264.00 feet to a point; thence south 56 degrees west 686.40 feet to a point; thence south 89 degrees west, still along the boundary line of the San Rafael Rancho, 759.50 feet to a point on the northerly line of the right of way of the Southern California Railway; thence north 70 degrees 22 minutes 45 seconds west along said northerly line of said right of way, 83.30 feet to a point; thence south 19 degrees 37 minutes 15 seconds west, 75 feet along said northerly line of said right of way to a point; thence north 70 degrees 22 minutes 45 seconds west, 667.59 feet along said northerly line of said right of way to a point; thence south 39 degrees 05 minutes 15 seconds west, 220.85 feet to a point; thence south 14 degrees 56 minutes 45 seconds east, 103.17 feet to a point; thence south 4 degrees 14 minutes west, 421.76 feet to a point; thence south 52 degrees 23 minutes west, 654.99 feet to a point; thence north 79 degrees 29 minutes 30 seconds west, 830.17 feet to a point in the southeasterly line of the right of way of the Los Angeles Terminal Railway; thence following said southeasterly line of said right of way along a curve to the left (the radius of said curve being 701.78 feet), 21.99 feet to a point, said point being south 56 degrees 16 minutes 15 seconds west, 21.98 feet from the last mentioned point; thence following said southeasterly line of said right of way south 30 degrees 18 minutes 15 seconds east, 10.03 feet to a point; thence following said southeasterly line of said right of way along a curve to the left (the radius of said curve being 691.78 feet), 83.50 feet to a point; said point being at the end of said curve, and also being south 51 degrees 51 minutes 15 seconds west, 83.46 feet from the last mentioned point; thence on a line tangent to

said curve, south 48 degrees 23 minutes 45 seconds west, 642.51 feet along said southeasterly line of said right of way to a point in the center line of Avenue 57; thence south 0 degrees 14 minutes east, 1646.90 feet to a point; thence south 83 degrees 16 minutes 15 seconds west, 195.19 feet to a point; thence south 2710.89 feet to a point, the same being the northeast Patent Corner of the City of Los Angeles, California, as per map hereinbefore mentioned; thence along the east Patent Boundary line of said City of Los Angeles and its prolongation, south 0 degrees 23 minutes 30 seconds east, 29,217.63 feet to a point; thence south 89 degrees 43 minutes 00 seconds west, 14,401.51 feet to a point; thence south 1 degree 13 minutes 00 seconds east, 1760.83 feet to a point; thence south 2 degrees 08 minutes 30 seconds east, 674.27 feet to a point; thence south 3 degrees 50 minutes 00 seconds east, 2721.73 feet to a point; thence south 4 degrees 19 minutes 00 seconds east, 1491.15 feet to a point; thence south 4 degrees 06 minutes 00 seconds east, 2637.61 feet to a point; thence north 89 degrees 13 minutes 00 seconds west, 2975.73 feet to a point; thence west 2632.54 feet to a point; thence south 89 degrees 17 minutes 30 seconds west, 1320.95 feet to a point; thence south 89 degrees 24 minutes 30 seconds west, 1330.50 feet to a point; thence south 89 degrees 46 minutes 30 seconds west 2649.30 feet to a point; thence south 0 degrees 09 minutes 30 seconds east 220.02 feet to a point; thence south 89 degrees 40 minutes 30 seconds west, 2647.48 feet to a point; thence south, 89 degrees 55 minutes 00 seconds west, 390.06 feet to a point; thence north 0 degrees 12 minutes 00 seconds west, 8105.59 feet to a point; thence south 89 degrees 29 minutes 00 seconds west, 2263.05 feet to a point; thence north 89 degrees 55 minutes 15 seconds west, 2616.34 feet to a point; thence north 89 degrees 36 minutes 30 seconds west, 2648.75 feet to a point; thence south 89 degrees 50 minutes 00 seconds west, 2627.60 feet to a point; thence north 0 degrees 05 minutes 00 seconds west, 2661.10 feet to a point; thence north 89 degrees

49 minutes 30 seconds west, 991.74 feet to a point; thence north 0 degrees 06 minutes 30 seconds east, 457.30 feet to a point; thence north 0 degrees 07 minutes 30 seconds west, 2184.50 feet to a point; thence north 89 degrees 59 minutes 00 seconds east, 809.72 feet to a point; thence north 0 degrees 07 minutes 00 seconds west, 7582.68 feet to the point of beginning; said courses being according to the true meridian; said boundaries embracing an area of 27,696.69 acres of land; and the said corporation shall continue vested with all the property rights of every kind now belonging to it.—[Amendment, 1903.]

Sec. 2. The said Corporation shall have the power:

(1) To make and use a corporate seal and alter the same at pleasure.

(2) To sue and be sued in all actions and proceedings whatever.

(3) To have perpetual succession.

(4) To erect and maintain public buildings, and to lay out, establish, improve and maintain public parks and cemeteries.

(5) To provide for the care of the sick and helpless.

(6) To make regulations to prevent the spread of epidemics and contagious and loathsome diseases.

(7) To provide for supplying the city and its inhabitants with water and gas, or either, or with other means of heat, illumination or power; and to acquire or construct and to lease or operate, and to regulate the construction or operation of conduits or of railroads, or other means of transit or transportation, and of plants and equipments for the production or transmission of gas, electricity, heat, refrigeration or power, in any of their forms, by pipes, wires or other means; and to incur a bonded indebtedness for any of such purposes, provided the question of the issue of bonds therefor shall first be submitted to the qualified electors of the city at a special or general election, and that three-fifths of the votes cast on the question of said issue of bonds shall have been cast in favor thereof.—[Amendment, 1905.]

(8) To lay out, open, extend, widen, improve or vacate,

pave and repave streets and alleys, sidewalks and crossings, and other highways.

(9) To construct and maintain sewers, drains and other works necessary for the disposition of sewerage.

(10) To establish and maintain public schools and public libraries.

(11) To levy assessments upon property to pay for the improvement of streets and other public improvements, and to collect the same, and to levy and collect taxes upon property for municipal purposes; provided that the tax levied for any one year, for all municipal purposes, other than payment of interest on the municipal debt and redemption of bonds, shall not exceed $1 on each $100 worth of taxable property.

(12) To manage, control, sell, lease, or otherwise dispose of any or all the property of the said corporation; and to appropriate the income or proceeds thereof to the use of the said corporation; provided that it shall have no power to mortgage or hypothecate its property for any purpose.

(13) To license and regulate the carrying on of any and all professions, trades, callings and occupations carried on within the limits of said city, and to fix the amount of license tax thereon to be paid by all persons engaged in such professions, trades, callings or occupations, provide the manner of enforcing the payment of the same; provided that no discrimination shall be made between persons engaged in the same business otherwise than by proportioning the tax upon any business to the amount of business done; and to license, regulate, restrain, suppress or prohibit any or all laundries, livery and sale stables, cattle and horse corrals, slaughter-houses, butcher-shops, hawkers, peddlers, pawnbrokers, dance-cellars, melodeons, shows, circuses, public billiard-tables, bowling and ten-pin alleys, and to suppress and prohibit all faro banks, games of chance, gambling-houses, tables or stands, bawdy-houses, the keeping of bees within the city limits, and any and all obnoxious, offensive, immoral, indecent or disreputable places of business or practice.

(14) To create offices, and provide for the election or appointment of officers other than those established by this charter, or by the general law, whenever the public convenience may require the same, and prescribe their duties and fix their compensation. (But this shall not be construed to authorize the creation of new offices and the appointment of other officers to perform the duties by this charter assigned to officers provided for herein, other than the necessary deputies and assistants to the officers of said city.)

(15) To acquire, by purchase, condemnation, or other lawful means, property, both real and personal, including water and water rights, within or without the corporate limits, necessary or convenient for municipal purposes, or for the exercise of the powers granted to said corporation.

(16) To fix the salaries of municipal offices, except those officers whose salaries are fixed by this charter.

(17) To provide and maintain a proper and efficient fire department, and make and adopt such measures, rules and regulations for the prevention and extinguishment of fires, and for the preservation of property endangered thereby, as may be deemed expedient.

(18) To protect the property of its inhabitants against inundations.

(19) To provide against the existence of filth, garbage and other injurious and inconvenient matter within the city, and for the disposition of the same.

(20) To make the violation of its ordinances a misdemeanor in all proper cases, and to prescribe the punishment therefor, by fine or imprisonment, or by both; but such fine not to exceed $500, and such imprisonment not to exceed six months.

(21) To prescribe the places at which elections shall be held, and appoint the officers of elections.

(22) To make and enforce within its limits such local, police, sanitary and other regulations as are not in conflict with general laws and are deemed expedient to maintain the public

peace, protect property, promote the public morals and to preserve the health of its inhabitants.

(23) To exercise all municipal powers necessary to the complete and efficient management and control of the municipal property, and for the efficient administration of the municipal government, whether such powers be expressly enumerated herein or not, except such powers as are forbidden or are controlled by general law.

(24) The powers conferred by this article shall be exercised by ordinance, except as hereinafter provided.

(25) No franchise, right or privilege in, on through, across, under or over any street, avenue, alley, bridge, viaduct, or other public place, and no other franchise whatever granted by the city to any corporation, association or individual, shall be granted except by an ordinance passed by vote of two-thirds (2-3) of the whole council, nor for a longer period than twenty-one years. Such grant and any contract in pursuance thereof shall provide that at the option of the city, declared not more than three (3) years, nor less than six months before the termination of such grant, the plant and property, if any, belonging to or used by the grantee, or his or its successors in interest, in the streets, avenues and other public places shall, at the termination of said grant, upon the payment of a fair valuation thereof, be and become the property of the city; but the grantee shall be entitled to no payment because of any valuation derived from the franchise. Provided, however, that such option shall not be exercised unless at the time of exercising the same the city shall be authorized and empowered to acquire and operate such plant and property. Every grant shall specify the mode of determining any valuation therein provided for and the time and mode of payment, and shall make adequate provision by way of forfeiture of the grant or otherwise to secure efficiency of public service at reasonable rates, and the maintenance of the property in good order throughout the term of the grant.—[Amendment, 1905.]

## ARTICLE II.

### OFFICERS OF THE MUNICIPALITY.

Sec. 3. The officers of the municipality shall be:

A Mayor.
One Councilman from each ward.
A City Clerk.
A Clerk of the Mayor.
A City Treasurer.
A City Auditor.
A City Tax and License Collector.
Seven Members of the Board of Education.
A City School Superintendent.
Five Directors of the Los Angeles Public Library.
A City Assessor.
A City Engineer.
A City Attorney.
A Superintendent of Buildings.
A Water Overseer.
A Street Superintendent.
Five Police Commissioners.
A Chief of Police.
A Chief Engineer of the Fire Department.
Five Members of the Board of Health.
A Health Officer.
Five Fire Commissioners.
Five Park Commissioners.—[Amendment, 1903.]

Sec. 4. The following officers shall be elected by the electors of the City of Los Angeles at large, to wit:

The Mayor.
The City Clerk.
The City Attorney.
The City Treasurer.
The City Auditor.
The City Tax and License Collector.

The City Engineer.
The Street Superintendent.
The City Assessor, and
Seven Members of the Board of Education;
And by the electors of each ward, respectively,
One Member of the Council.

The city shall be divided into nine wards as follows:

FIRST WARD.

All that portion of the city bounded and described as follows: Beginning at the intersection of the northerly city boundary with the center of the Los Angeles river; running thence along the center of said river southerly to the center line of Macy street; thence easterly along the center line of Mission Road; thence northeasterly along the center line of Mission Road to the center line of Griffin Avenue; thence southeasterly along the center line of Griffin avenue to the center line of Soto street; thence northeasterly along the center line of Soto street to the center line of Mission Road; thence easterly along the center line of Mission Road to the east city boundary; thence northerly, northeasterly, westerly, southwesterly, and westerly along the exterior boundaries of the City of Los Angeles to the point of beginning.

SECOND WARD.

All that portion of the city bounded and described as follows: Beginning at the intersection of the north city boundary with the center of the Los Angeles River, and running thence southerly along the center of said river to the center line of Downey avenue; thence southerly along the center line of Downey avenue, San Fernando street, and Main street to the center line of First street; thence westerly along the center line of First street to the west patent boundary line of the city; thence northerly along said west patent boundary line to the northwest corner of the city; thence easterly along the north boundary line of the city to the place of beginning.

## CITY OF LOS ANGELES.

### THIRD WARD.

All that portion of the city bounded and described as follows: Beginning at the intersection of the center lines of First and Main streets; thence running westerly along the center line of First street to the west patent boundary of the city; thence northerly along the said west patent boundary to the south line of the Dayton Heights Tract; thence westerly along the south line of the Dayton Heights Tract to the center line of Vermont avenue extended; thence southerly along the center line of Vermont avenue extended, Vermont avenue and the prolongation of Vermont avenue, to the center line of Seventh street; thence easterly along the center line of Seventh street to the center line of Main street; thence northerly along the center line of Main street to the point of beginning.

### FOURTH WARD.

All that portion of the city bounded and described as follows: Beginning at the intersection of the center lines of Seventh and Main streets; running thence southerly along the center line of Main street to the center line of Washington street; thence westerly along the center line of Washington street to a point 150 feet west of the west line of Arlington street; thence northerly along the west city boundary to a point 150 feet north of the north line of Wilshire Boulevard; thence easterly to the west boundary line of the West End University Addition to Los Angeles; at a point 150 feet north of the southwest corner thereof; thence southerly along said boundary line and the center line of Vermont avenue to the center line of Seventh street; thence easterly along the center line of Seventh street to the point of beginning.

### FIFTH WARD.

All that portion of the city bounded and described as follows: Beginning at the intersection of the center lines of Washington and Main streets; thence southerly along the center line of Main street to a point 150 feet south of the south line of

Slauson avenue; thence westerly along the southerly boundary of the city to a point 360 feet west of the westerly line of Figueroa street; thence northerly, westerly, northerly, westerly, northerly, easterly, and northerly, along the exterior boundaries of Los Angeles City to the center line of Washington street; thence easterly along the center line of Washington street to the point of beginning.

SIXTH WARD.

All that portion of the city bounded and described as follows: Beginning at the intersection of the center line of Ninth and Main streets; thence easterly along the center line of Ninth street to the center of the Los Angeles River; thence southerly along the center of the Los Angeles River to the south city boundary; thence westerly, southerly, and westerly, along the exterior boundaries of Los Angeles City to the center line of Main street; thence northerly along the center line of Main street to the point of beginning.

SEVENTH WARD.

All that portion of the city bounded and described as follows: Beginning at the intersection of the center lines of Main and First streets; thence easterly along the center line of First street to the center of the Los Angeles River; thence southerly along the center of the Los Angeles River to the center line of Ninth street; thence westerly along the center line of Ninth street to the center line of Main street; thence northerly along the center line of Main street to the point of beginning.

EIGHTH WARD.

All that portion of the city bounded and described as follows: Beginning at the intersection of the center lines of First and Main streets; running thence easterly along the center line of First street to the center of the Los Angeles River; thence northerly along the center of the Los Angeles, to the center line of Downey avenue; thence southerly along the center line of

Downey avenue, San Fernando street, and Main street to the place of beginning.

NINTH WARD.

All that portion of the city bounded and described as follows: Beginning at the intersection of the center line of Macy street with the center of the Los Angeles River; thence easterly along the center line of Macy street to the center line of Mission Road; thence northeasterly along the center line of Mission Road to the center line of Griffin avenue; thence southeasterly along the center line of Griffin avenue to the center line of Soto avenue; thence northeasterly along the center line of Soto street to the center line of Mission Road; thence easterly along the center line of Mission Road to the easterly line of Los Angeles City; thence southerly along the easterly line of Los Angeles City to the southeasterly corner of Los Angeles City; thence westerly along the southerly line of Los Angeles City to the intersection of the center of the Los Angeles River; thence northerly along the center of the Los Angeles River to the point of beginning.

The center of streets and the center of the Los Angeles River will in all cases be the dividing line.

And the Council herein provided shall have power by ordinance to establish and change the boundaries thereof whenever it may deem it expedient; but until changed by the Council the said wards shall remain as above described and established.—[Amendment, 1903.]

Sec. 5. All elective officers, except those elected at the general municipal election to be held on the first Tuesday in December, 1906, shall hold their offices for a term of two years, commencing on the first Monday in January next succeeding their election.—[Amendment, 1905.]

Sec. 6. The Mayor shall appoint a Clerk of the Mayor. He shall also appoint subject to confirmation by a majority of the Council, the Superintendent of Buildings, and such other officers of the municipality mentioned in this charter whose appoint-

ments are not otherwise provided for herein.—[Amendment, 1903 ]

Sec. 7. The City School Superintendent shall be appointed by the Board of Education. The Chief of Police shall be appointed by the Board of Police Commissioners. The Chief Engineer of the First Department shall be appointed by the Board of Fire Commissioners. The Health Officer shall be appointed by the Board of Health. Each Police Judge shall appoint his own clerk.—[Amendment, 1903.]

Sec. 8. If any elective officer shall die or remove from the city or absent himself from the city for more than thirty days, or shall fail to qualify by taking the oath of office and filing his official bond, as required, within ten days from the time he receives his certificate of election or appointment, or if he shall resign, or be convicted of a felony, or adjudged insane, or shall absent himself from his office for more than five days without the consent of the Council, his office may be declared vacant by the council, and it shall thereupon fill the vacancy.

Sec. 9. All appointed officers shall hold office until removed by the appointing power, which shall have the power of removing in all cases; provided that where confirmation is required the assent of the confirming body shall be requisite for removal.

The Council shall have power to suspend any officer of the city, pending trial, against whom criminal proceedings based on misdemeanor in office or civil action for recovery of money due the city has been commenced, and to appoint a substitute for such office during suspension.

In all voting upon the appointment, confirmation, suspension and removal of officers the members of the Council, or other body appointing confirming, suspending or removing, shall vote by open ballot or call of roll, and the ballot or vote of each member shall be spread upon the minutes.

Sec. 10. Every officer provided for in this charter shall, before entering upon the discharge of the duties of his office, take and subscribe to the following oath or affirmation: "I do solemn-

ly swear (or affirm as the case may be) that I will support the Constitution of the United States and the State of California, and that I will faithfully discharge the duties of the office of (here inserting the name of the office) ..... according to the best of my ability.

Sec. 11. No member of the Council shall, during the term for which he shall have been elected, be eligible to any office to be filled or confirmed by the Council; nor shall any member of the Council be selected to fill any vacancy that may occur in any other office where such a vacancy is to be filled or confirmed by the Council.

## ARTICLE III.

### POWERS AND DUTIES OF THE COUNCIL.

Sec. 12. All legislative power of the city is vested in the Council, subject to the power of veto and approval by the Mayor, as hereinafter given, and shall be exercised by ordinance; other action of the Council may be by order upon motion.

Sec. 13. The said Council, consisting of one Councilman from each ward, elected as herein provided, is the governing body of the city, and shall meet at least once a week, and shall by ordinance provide for the manner, time and place of holding all regular and special meetings.

Sec. 14. The Council shall meet in the City Hall of the city. The records of its proceedings shall be open for inspection during usual office hours.

Sec. 15. The enacting clause of all ordinances shall be substantially as follows: "The Mayor and Council of the City of Los Angeles do ordain as follows:"

Sec. 16. Six members of the Council shall constitute a quorum for the transaction of business, but no ordinance shall be passed or other act done granting a franchise, making any contract, auditing any bill, ordering any work to be done, or supplies to be furnished, disposing of or leasing the city property,

ordering any assessment for street improvement, or building sewers, or any other act to be done involving the paying of money, or the incurring of debt by the city, unless two-thirds of the members of the whole Council vote in favor thereof. All other ordinances may be passed by a vote of a majority of the whole Council.

Sec. 17. All bonds of officers must be approved by the Council, as also the bonds of any contractors with the city. The City Clerk shall indorse upon such bonds the date of their approval, which indorsement shall be signed by the presiding officer of the Council and the City Clerk.

Sec. 18. No Councilman or other city officer shall be interested, directly or indirectly in any contract to which the city is a party, or made by any officer of the city in behalf of the city. Any violation of this section shall be a misdemeanor, and upon conviction thereof, besides the penalties that may be imposed by a court of competent jurisdiction, the Council shall declare the office vacant, and any person convicted of a violation of this section shall be forever disqualified from holding any office under this charter. Nor shall any officer of the city be a surety on any bond given to the city, or to any person for the benefit of the city.

Sec. 19. The City Clerk shall be present at the meeting of the Council during its sessions.

Sec. 20. The meetings of the Council shall be public, and a journal of the proceedings shall be kept by the Clerk under its direction, and the ayes and noes shall be taken and entered in the journal in the final action upon the granting of franchises, making of contracts, auditing bills, ordering work to be done or supplies furnished, disposing of or leasing city property, the passage of any ordinance, the ordering of assessments for street improvements, or building of sewers, or upon any other act that may involve the payment of money, or the incurring of a debt by the city, and upon the payment of the salaries of the municipal officers; and in all other cases upon the call of any member.

Sec. 21. The Council shall be the judge of the election and qualifications of its members. It shall elect one of its members as its presiding officer, who shall be styled the President of the Council, and who shall, in case of sickness of the Mayor or his absence from the city, act as the Mayor of the city. The Council shall have power to prescribe the rules of its proceedings, and to preserve order at its meetings, and may punish contemptuous or disorderly conduct committed in its presence by fine not exceeding fifty dollars, and imprisonment not exceeding ten days, or by both such fine and imprisonment.

Sec. 22. It shall prescribe by ordinance the duties of all officers whose duties are not defined by this charter, and it may by ordinance prescribe for any officer duties other than those herein prescribed and not inconsistent with the provisions of this charter, and may fix the hours during which the public office of any city officer shall be kept open, if not otherwise herein provided.

Sec. 23. It shall provide suitable rooms for the Police Court and officers, and the furniture, fuel, lights and stationery necessary for the transaction of the business of the city.

Sec. 24. It shall by ordinance regulate the entrance to and exits from threatres, lecture rooms, churches, public halls, and public buildings of every kind, and prohibit the placing of chairs, benches or other obstructions in the hall, aisles, or open places therein.

Sec. 25. It may, by ordinance, declare what constitutes a nuisance, and provide for the abatement and removal thereof.

Sec. 26. It shall make such arrangements as it may deem best for the care and custody and feeding of all persons imprisoned by municipal authority, or sentenced to imprisonment by the Police Courts, and may, by ordinance, require all persons held under sentence to perform any public work.

Sec. 27. It shall, by ordinance, regulate, and may prohibit, the keeping of gunpowder, acids, or other explosive, combustile or inflammable material within the limits of the city, or any specified part thereof.

Sec. 28. It shall provide for the surveys of streets and blocks of land within the limits of the city, and may, by ordinance, declare such surveys official, and may compel all persons to conform to the streets as they are now or may be hereafter lawfully established and declared official, or otherwise dedicated.

Sec. 29. It shall, by ordinance, establish stands for hacks and other vehicles for hire, and regulate the charges of hacks and other vehicles carrying passengers for hire, and require a schedule of such charges to be posted in every such hack or other passenger vehicle.

Sec. 30. It shall, by ordinance, establish fire districts, and determine the character of buildings that may be erected therein, and the nature of the materials to be used in the construction, alteration or repair of such buildings, or in the repair or alteration of existing buildings within such limits.

Sec. 31. The Council shall have power, by ordinance, to regulate and provide for lighting of streets, laying down gas pipes and erection of lamp posts, electric towers and other apparatus, and to regulate the sale and use of gas and electric light, and fix and determine the price of gas and electric light, and the rent of gas meters within the city, and regulate the inspection thereof, and to regulate telephone service, and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service, and connections; and to prohibit or regulate the erection of poles for telegraph, telephone or electric wire in the public grounds, streets or alleys, and the placing of wire thereon; and to require the removal from the public grounds, streets or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone or electric wires.

Sec. 32. It shall, by ordinance, provide for the naming of streets and numbering of houses, and for regulating or preventing the exhibition of banners, flags or placards across the streets, or sidewalks, and for regulating or suppressing public criers, advertising, ringing of bells, and other noises.

It shall, by ordinance, forbid the erection or display on any

building or property of the city, of any banner, device or flag of any State or Nation except that of the United States, the State of California or the City of Los Angeles.

It may, by ordinance, authorize the expenditure of money not to exceed the sum of three thousand dollars, in any one fiscal year, for the proper celebration of the 4th of July and other public demonstrations.

Sec. 33. It shall, by ordinance, provide for maintaining a fire alarm and police telegraph system, and for the cleaning and sprinkling of graded and accepted streets.

Sec. 34. It shall, by ordinance, regulate the speed of railroad trains and engines in the city, and require railroad companies either to station flagmen, place gates or viaducts at all such streets as it may deem proper.

Sec. 35. It shall by ordinance prohibit the making up of railroad trains on any of its streets, and the stopping of any train on any street crossing.

Sec. 36. It shall, by ordinance, provide for the removal of all rubbish, garbage, refuse matter, and of all material detrimental to the public health, and at such time as it will be the best for the public good.

Sec. 37. Every ordinance which shall have been passed by the Council shall, before it becomes effective, be signed by the City Clerk or other person authorized by the Council to sign the same on its behalf, and be presented to the Mayor for his approval and signature, if he approves it; if not, he shall indorse thereon the date of the presentation to him and shall return it to the City Clerk with his objections in writing. The City Clerk shall indorse thereon the date of its return to him, and shall at the first meeting of the Council thereafter present the same, with the objections of the mayor, to that body. Thereupon the Council shall proceed to reconsider the passage of the ordinance. Upon such reconsideration, in all cases where the votes of two-thirds of the whole Council are required to pass the ordinance in the first instance, it shall require the votes of three-quarters of the whole Council to pass the ordinance over the Mayor's veto.

In all other cases it shall require the votes of two-thirds of the whole Council to pass the ordinance over the veto. The vote, in all cases of reconsideration, shall be by ayes and noes, and the names of the members voting for or against shall be entered upon the journal.

Sec. 38. If any ordinance shall not be returned to the City Clerk by the Mayor, with his objections in writing, within ten days after it shall have been presented to him, it shall become effective and be as valid as if the Mayor had approved and signed it.

Sec. 39. All ordinances finally adopted under the provision of this charter shall be published in the English language by at least one insertion in some daily newspaper printed and published in the City of Los Angeles, or by posting for at least ten days in three public places in said city, and until and without such publication or posting no ordinance shall be valid or take effect.

Sec. 40. The Council shall also have full power to pass ordinances upon any other subject of municipal control or to carry into effect any other powers of the municipality.

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## ARTICLE IV.

### POWERS AND DUTIES OF OFFICERS.

### MAYOR.

Sec. 41. The Mayor is the executive officer of the corporation, and must exercise a careful supervision over all its affairs.

It shall be the duty of the Mayor, annually, at the first meeting of the Council under this charter, and on the first meeting in January of each year thereafter, to communicate by message to the Council a general statement of the condition and affairs of the corporation, and to recommend the adoption of such measures as he may deem expedient and proper; and to make such

special communication to the Council from time to time as he shall deem expedient.

It shall be his further duty to be vigilant and active in the enforcement of the ordinances of the city; to exercise a constant supervision over the acts and conduct of all its officers and employees; to receive and examine into all complaints made against them for violation or neglect of duty, and certify the same to the Council, or proper board.

And he shall perform such other duties and have such other powers as are elsewhere in this charter, or by ordinance, imposed upon or granted to him.

### City Clerk.

Sec. 42. The City Clerk shall have the custody of, and be responsible for, all books, papers, records and archives belonging to the city, not in actual use by other officers, or elsewhere by special provision committed to their custody.

He shall be present at each meeting of the Council, and keep a record of its proceedings.

He shall keep separate books in which respectively he shall record all ordinances and contracts and official bonds.

He shall keep all the books properly indexed, and open to public inspection when not in actual use.

He shall make out, sign and deliver to the City Auditor all licenses other than building permits, and perform such other duties as are, or shall be, imposed by this charter, or by ordinance. He shall devote his entire time to the duties of his office.

### City Auditor.

Sec. 43. The City Auditor shall act as the general accountant and fiscal agent of the city, and shall exercise a general superintendence over all of the officers of the city charged in any manner with the receipt, collection or disbursement of the city revenues.

He shall keep a complete set of books, in which he shall set forth in a plain and business-like manner every money transaction of the city, so as to show at all times the state of each fund,

from what source the money was derived, and for what purpose any money was expended, and also all collections made and paid into the treasury by each officer or any other person.

He shall, on application of any person indebted to the city, holding money payable into the City Treasury, or desiring to pay money therein, certify to the City Treasurer the amount thereof, to what fund applicable, and by whom to be paid. He shall upon the deposit of the receipt of the City Treasurer for money paid into the City Treasury, charge the City Treasurer with the amount received by him, and give the person paying the same a receipt therefor.

It shall be his duty to apportion among the several funds all public money at any time in the City Treasury, not by law or ordinance specifically apportioned and appropriated, and forthwith notify the City Treasurer of such apportionment or appropriation. He shall countersign and deliver to the proper officer all licenses.

He shall report to the Council at the regular meeting of each week the condition of each fund in the City Treasury and the amount drawn from each fund the preceding week.

He shall make and present a report to the Council at its meeting in the second week of December of each year, showing all financial business transactions of the city for the preceding year ending the 30th day of November last.

He shall audit and approve all demands against the city before payment, and keep a record of the same as hereinafter provided in Article XXI.

He shall on or before the first day of August in each year, make and present to the Council a report as to the revenue and expenses of the city for the current fiscal year, in which he shall set forth estimates of (1), the revenue from other sources than taxation; (2), the itemized expenditures; (3), the itemized amounts necessary to be raised by taxation for each fund.

He shall perform such other duties as shall be required of him by this charter or by ordinance. He shall devote his entire time to the duties of his office.

### City Treasurer.

Sec. 44. It shall be the duty of the City Treasurer to receive and keep all moneys that shall come to the city by taxation or otherwise, and to pay the same out on demands legally audited in the manner hereinafter provided; and without such auditing he shall disburse no public moneys whatever, except the principle and interest of the municipal debt when payable.

He shall receive no money into the City Treasury unless accompanied by the certificate of the City Auditor provided for in Section 43 hereof.

He shall issue receipts in duplicate to all persons paying money into the treasury.

One of which receipts shall be forthwith deposited with the City Auditor.

He shall make a report at the close of each business day, to the Auditor, showing all moneys received during the day, together with the number of each receipt given by him therefor, and what account and from whom received and to what fund applied.

He shall, on or before the seventh day of each month, make out and present to the Council a full and complete statement of the receipts and expenditures for the preceding calendar month; and he shall make such special reports from time to time as may be required by the Council.

The Mayor, City Attorney, City Auditor, the Finance Committee of the Council, or any special committee appointed by the Council, separately or collectively, and with the aid of an accountant selected by such officer or committee, shall have the right and power to examine the books of the Treasurer at all times; and the Mayor, Auditor or Finance Committee shall also have the right to inspect and count all public moneys under the Treasurer's control, or on deposit elsewhere. Whenever the city shall provide a proper vault and safes in the City Hall for the keeping of the city money, the Treasurer shall keep said moneys in said vault, except as hereinafter provided. It shall be in the power of the Council, by ordinance. at any time to

require the City Treasurer to devote his entire time to the duties of his office.

It shall be the duty of the City Clerk upon the first Tuesday of January in each year, or as soon thereafter as practicable, to cause notice to be given, by public advertisement for one week in some daily newspaper published in the City of Los Angeles, that sealed proposals be received from any bank of deposit in the City of Los Angeles as to the terms and conditions upon which they will receive and disburse the public moneys of said city; such proposals shall be received up to the time to be specified in the notice. The proposals to be made shall specify that the rate of interest per month, estimated upon the daily balances, that will be allowed upon such deposits of public moneys. Such sealed proposals shall be publicly opened by the Clerk, in the presence of the Council, at its first meeting after the expiration of the time for receving proposals. The bank offering the highest rate of interest shall be appointed the depository of public moneys. The Council shall thereupon cause a contract in writing to be drawn and providing for the proper payment of all warrants drawn upon the City Treasurer, so long as there is sufficient money in the fund upon which such warrant is drawn, and sufficient money to the credit of said city on deposit in said bank to pay the same; and providing also for the full accounting of all moneys so deposited, and the repayment of the balance on deposit at the end of the term for which said contract shall be made to the City Treasurer, or other person authorized by the Council to demand and receive the same. The Council shall have the power to require such other provisions to be inserted in such contract as it shall deem best for the interests of said city. The contract, when approved by the Council, shall be signed, in behalf of the city, as hereinafter provided by Section 207 of this charter. Such depository, thus selected, shall give a bond, with two or more sureties, in the sum of one hundred thousand dollars, or such further sum as the Council may require, conditioned for the faithful keeping and proper disbursement of all such moneys; said bond to be approved by the Mayor and Council.

Upon approval of such bond, and the signing of such contract, the Council shall direct the City Treasurer to deposit each day when such bank is open for the transaction of business, with the bank thus selected, all public moneys of said city by him collected or received. For each such deposit the Treasurer shall take the receipt of the bank, and from and after the deposit of such money in said bank the Treasurer and his bondsmen shall no longer be liable therefor. Should the City Treasurer refuse or neglect at any time to comply with the orders of the Council, as to the deposit of such moneys, he shall be liable upon his official bond, in an action brought thereon, by and in the name of said corporation, for the full amount of the interest which the corporation should have received upon such moneys during such time he shall retain the possession or control of such moneys; or he may be proceeded against by said corporation, in its own name, by mandate brought against him under the laws of this State, applicable thereto, to compel such deposits to be made.

### City Tax and License Collector.

Sec. 45. It shall be the duty of the City Tax and License Collector, in addition to the duties which may be elsewhere prescribed for him in this charter or by ordinance, to collect all taxes and licenses of the city, excepting those hereinafter provided to be collected by the City Assessor.

He shall keep proper books, showing all moneys collected by him as Tax and License Collector.

He shall also keep a book which shall contain a record of every deed given by or on behalf of the city for real estate sold for delinquent taxes or assessments, which book shall be properly indexed and shall be at all suitable times subject to public inspection.

He shall immediately deposit with the City Treasurer all moneys received by him in his capacity as Tax and License Collector.

CITY ASSESSOR.

Sec. 46. It shall be the duty of the City Assessor, in addition to any duty that may be elsewhere prescribed for him by this charter or by ordinance, to make out, within such a time as may be prescribed by ordinance of said city, either now in force or which may hereafter be passed in pursuance hereof, a full, true and correct list of all the property, both real and personal, taxable by law, within the limits of said city, with the valuation thereof, and assess the same to the persons by whom it was owned or claimed, or in whose possession or control it was, at 12 o'clock meridian on the first Monday of March next preceding.

Each taxpayer in said city shall make and deliver to the City Assessor annually, and at such time as shall be provided for by ordinance, a statement under oath setting forth specifically all the real and personal property owned by such taxpayer, or in his possession or under his control at 12 o'clock meridian on the first Monday of March next preceding.

It shall be the duty of the Assessor to collect the taxes on all personal property, when the owner of said property is not seized of real estate in said city sufficient to afford ample security for the collection of said taxes.

In all such cases he shall be governed in fixing the amount of the tax by the rate of the tax levy for the preceding year.

Immediately after fixing the assessment on such property he shall serve on its owner or owners a notice in writing, which shall specify the assessed valuation of the property, the rate per cent and the amount of tax payable, and contain a demand for the payment of said tax within three days after service of said notice. Said notice shall be served personally, or by leaving a copy of the same at the last known place of residence of the person whose property is so assessed.

Upon the expiration of said three days after such service, if the tax demanded still remains unpaid or payment thereof be not secured to the satisfaction of the City Attorney and City Assessor, the Assessor shall forthwith proceed to collect the

same by seizure and sale of any personal property owned by the delinquent.

The said sale shall be made by him in the manner provided in Sections 3791, 3792, 3793, 3794, 3795 and 3796 of the Political Code of the State of California, provided, that the newspaper referred to in Section 3792 shall be published in the city, and shall be designated by the Council.

As soon as the rate is fixed for the year in which such collection is made, if it be found that a sum in excess of said rate has been collected, the excess must be repaid in the same manner as other demands against the city are paid, to the person from whom the collection was made, or to his assigns. And if a sum less than the rate fixed has been collected, the deficiency must be collected as other taxes on personal property are collected.

Should the Board of Equalization reduce the valuation for the same year of the property so assessed, the sum collected in excess of said reduced valuation must be repaid in like manner, to the person from whom the collection was made, or to his assigns. And if the valuation of said property should be increased by said Board, then the deficiency must be collected as other taxes on personal property are collected.

The Assessor shall carefully note upon his assessment list, and also in a book to be kept by him for the purpose, all collections made by him under this section, and shall turn over to the City Treasurer all money received immediately upon its receipt.

In case the said Assessor shall fail to demand, and through his fault to collect, any and all taxes which by this section he is directed to collect, he shall be and become personally liable to the city for the amount of said delinquent taxes, with interest from the date of their assessment; and the Council is authorized and directed to cause proper action or actions at law to be brought against said Assessor and the sureties on his official bond to recover the same.

The mode of making out assessment lists, of ascertaining the value of property and of equalizing the same shall be

such as is now, or may hereafter be, prescribed by the ordinances of the city.

When such list has been made out and the same returned to the Council, as prescribed by such ordinances, the Council shall, at the time and in the manner in such ordinance provided, sit and act as a Board of Equalization, and shall have, as regards the equalization of said list, powers similar to those conferred by law upon the Board of Supervisors of Los Angeles county, as a Board of Equalization of State and county taxes.

The meetings of said Board of Equalization shall be public, and notice of such meetings shall be given by publication at such time and in such manner as shall be provided by ordinance. The whole of said assessment list shall be publicly read during the session of said board. The said board shall have the power, in its discretion, to increase or diminish the amount of any or all of the assessments on said lists, both as to real and personal property: provided that before any such assessment shall be increased, due notice shall be given to the owner or owners of the property the assessed value of which is sought to be increased, and such owner or owners shall have the opportunity to be heard before the board, under oath, such notice to be regulated in all respects by ordinance.

After such list has been equalized, it shall be returned to the Council, which shall forthwith fix the levy or rate per cent of taxes levied for all municipal purposes for that fiscal year.

Every tax so levied shall have the force and effect of a judgment against the person and property taxed, and shall be and constitute a lien upon the real property situated in said city so assessed or owned by the party against whom such assessment is made.

Every such assessment and the lien thereof shall have the force and effect of an execution duly levied upon all property owned by the party assessed, or by the unknown owner of such property when assessed to an unknown owner. The judgment is not satisfied nor discharged until the tax assessed against the

property and the owners is paid, or the property sold for the payment thereof.

The said corporation shall have such other rights, claims and liens for the amount of such municipal taxes as may now or hereafter be given to or exercised by the people of the State of California for and on account of the assessment of State and county taxes levied in Los Angeles county.

The mode and manner of collecting such municipal taxes, and enforcing such tax lien, and the proceedings thereafter, shall substantially be the same as the mode and manner at the time prescribed by law for the collection of State and county taxes in said county; provided, however, that the Council may, by ordinance, have the power to regulate the time or times of the collection of said taxes within each fiscal year, and prescribe by what officers the respective duties appertaining to such collection and enforcement shall be performed. All such proceedings, sales, certificates and conveyances had, made and executed by them in pursuance thereof, shall be of like force, effect and validity as is or may hereafter be given by law to like proceedings and acts in the matter of the collections of State and county taxes in said county.

BOARD OF EDUCATION; BOARD OF DIRECTORS OF THE LOS ANGELES PUBLIC LIBRARY; BOARD OF HEALTH; BOARD OF POLICE COMMISSIONERS; BOARD OF FIRE COMMISSIONERS; BOARD OF PARK COMMISSIONERS; BOARD OF WATER COMMISSIONERS.

Sec. 47. The powers and duties of these boards shall be those herein elsewhere set forth, and granted or imposed by ordinance.

CITY ENGINEER.

Sec. 48. In addition to other duties imposed upon him by this charter, or by ordinance of the Council, the City Engineer shall:

1. Make all surveys, inspections and estimates required by the Council.

2. He shall examine all public works done under contract, and report thereon to the City Council.

3. He shall do no work for and take no fee or professional recompense from any individual or corporation other than the city during his term of office; provided, however, that on application of any person owning or interested in real property in said city for a survey or plat of such property, the City Council may direct such work to be done by the City Engineer; and the fee for such work shall be fixed by him in accordance with current rates for like services, and shall in all cases be paid into the city treasury.

4. He shall be the custodian of and responsible for all maps, plans, profiles, field notes and other records and memoranda belonging to the city pertaining to his office and the work thereof; all of which he shall keep in proper order and condition, with full index thereof, and shall turn over the same to his successor.

5. All maps, plans, profiles, field notes, estimates and other memoranda of surveys and other professional work made or done by him, or under his direction or control during his term of office, shall be the property of the city. He shall devote his entire time to the duties of his office.

Upon the first appointment of a City Engineer by the Board of Public Works, organized under this charter, the term of the City Engineer then holding office shall thereupon cease and determine, and the powers and duties of the City Engineer shall be as prescribed elsewhere in this charter.—[Amendment, 1905.]

## The City Attorney.

Sec. 49. It shall be the duty of the City Attorney to prosecute on behalf of the people all criminal cases arising upon violations of the provisions of this charter and city ordinances, and to attend to all suits, matters and things in which the city may be legally interested; provided, the Council shall have control of all litigation of the city and may employ other attorneys to take

charge of any such litigation, or to assist the City Attorney therein.

He shall give his advice or opinion in writing, whenever required by the Mayor or Council, and shall do and perform all such things touching his office as by the Council may be required of him.

He shall approve, by indorsement in writing, the form of all official or other bonds required by this charter, or by ordinance of the Council, before the same are submitted to the Council or Mayor for final approval, and no such bonds shall be approved by the Mayor or Council without such approval by the City Attorney.

He shall approve in writing the drafts of all contracts before the same are entered into on behalf of the city.

### Superintendent of Buildings.

Sec. 50. (1) The Superintendent of Buildings shall be an architect, builder or master mechanic of approved character and experience.

(2) He shall superintendent the erection of all buildings erected by or for the city.

(3) He shall have charge of the enforcement of all ordinances pertaining to party walls, and to the erection, construction, alteration, repairs or removal of buildings, and the nature and arrangement of heating, plumbing and ventilating appliances. It shall be the duty of the City Engineer and the Chief Engineer of the Fire Department, when called upon by him, to aid him in all inspections.

(4) He shall issue and keep a record of all building permits authorized by ordinance, and collect and deposit the charges for the same with the Treasurer immediately upon receipt; and perform such other duties as shall be prescribed by this charter or by ordinance. He shall devote his entire time to the duties of his office.

Sec. 50a. Upon the organization of a Board of Public

Works under this charter, it shall be the successor in office of the Superintendent of Buildings, and the term of the Superintendent of Buildings then holding office shall thereupon cease and determine, and the powers and duties imposed upon the Superintendent of Buildings by this charter shall thereafter be exercised and performed by the Board of Public Works.—[Amendment, 1905.]

SUPERINTENDENT OF WATER WORKS AND WATER OVERSEER.

Sec. 51. The Superintendent of Water Works and the Water Overseer shall have such powers and perform such duties as the Board of Water Commissioners shall prescribe.—[Amendment, 1903.]

STREET SUPERINTENDENT.

Sec. 52. The Street Superintendent shall have the general care of, and frequently inspect the streets of the city. He shall receive and investigate all complaints as to their condition and shall have charge of the enforcement of all ordinances pertaining to street obstructions.

He shall frequently inspect all public works pertaining to street improvements while the same are in course of construction, inspect and approve or reject all material used in such construction, whether done by contract or otherwise; and shall at once report to the Council all deviations from contracts and use of improper material and bad workmanship in such works; and shall have the power, pending investigation, to stop all work thereon.

He shall perform such other duties as are herein elsewhere prescribed or imposed by ordinance. He shall devote his entire time to the duties of his office.

Sec. 52a. Upon the organization of a Board of Public Works under this charter it shall be the successor in office of the Street Superintendent, and the term of the Street Superintendent then holding office shall thereupon cease and determine, and the powers and duties imposed upon the Street Superintendent by this charter shall thereafter be exercised and performed by the Board of Public Works.—[Amendment, 1905.]

### Chief of Police.

Sec. 53. The Chief of Police shall have the supervision and control of the police force of the city, and in that connection he shall be subject only to the orders of the Board of Police Commissioners, and all orders of the Board relating to the direction of the police force shall be given through the Chief of Police, or in his absence, the officer in charge of the police force.

Sec. 54. The Chief of Police shall be the principal ministerial officer of the corporation, and may, with the approval of the Board of Police Commissioners, select and appoint one or more deputies from the police force, for whose official acts he shall be responsible. He shall, by himself or by deputy, execute and return all writs and processes issued by the police judges or courts. He, or one of his deputies, shall attend on the sittings of the Police Court and preserve order therein; and his jurisdiction and that of his deputies in the service of process in all criminal cases, and in cases of violation of the city ordinances, shall be co-extensive with the county.

Sec. 55. He shall suppress all riots, disturbances and breaches of the peace, and to that end may call on any person to aid him. He may pursue and arrest, within the limits of the city, any person fleeing from justice from any part of the State, and shall forthwith bring all persons by him arrested before a police judge for trial or examination. He may receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or States.

Sec. 56. He shall have, in the discharge of his proper duties, like powers and be subject to like responsibilities as a Sheriff in similar cases, and shall perform such other duties and have such other powers as may be imposed on or granted to him by this charter or ordinance.

### Health Officer.

Sec. 57. The Health Officer shall have such powers and perform such duties as are herein or may by ordinance be granted to or be imposed upon him.

## Annual Reports of Officers.

Sec. 58. It shall be the duty of the Mayor, City Attorney, City Treasurer, City Assessor, City Tax and License Collector, Chief of Police, City Auditor, Health Officer, Water Overseer, City Clerk, City Engineer, Superintendent of Buildings, Street Superintendent, Chief Engineer of the Fire Department, City Sealer of Weights and Measures, City School Superintendent, Board of Directors of the Los Angeles Public Library, and the Board of Park Commissioners, each to present to the Council at its meeting in the second week in December of each year, a report for the preceding year ending the 30th day of November last, which shall show as follows:

(1) The Mayor shall, in addition to his report as Mayor, inform the Council of the condition of the Police Court, the number of arrests made, the offenses charged and how disposed of, the penalties inflicted and amount of fines and from whom collected; and to that end he may require such reports from the Police Judges as he may deem necessary.

(2) The City Attorney shall, in his report, present an abstract of all actions and proceedings in the Supreme and Superior Courts, where the city is an interested party; and shall show what cases have been disposed of during the year, and in what manner, and the condition of those remaining on the calendar.

(3) The City Treasurer shall show, in his report, specifically, the amount of all indebtedness of the city; of money received by him during the year, the date of the receipt thereof, and from whom; the amount paid out, when, and to whom; and the date and number of the demands on which the respective amounts are paid.

(4) The City Tax and License Collector shall report the amount of money received, and on what account.

(5) The City Assessor shall, in his report, show the amount of personal property taxes collected by him, together with the amount of any fees which he may have received on account of such collection in each case.

(6) The City Auditor shall make a proper statement of the transactions of his office, as provided in Section 43.

(7) The Chief of Police shall report the number of arrests made by him, the offenses charged and how disposed of, the number and names of the policemen employed, when appointed and when discharged, and all money and other property received from prisoners and the disposition of the same.

(8) The Health Officer shall show the condition of the health of the city during the year, and the number of cases of diseases which he has treated; and other matters of interest pertaining to his office.

(9) The Water Overseer shall, in his report, show the amount of water rates or charges collected by him; and shall make a detailed statement of the condition of the water systems of the city, so far as the same are entrusted to his charge.

(10) The report of the City Clerk shall show the number of licenses issued, and for what amount.

(11) The report of the City Engineer shall show the character, cost and condition of all public works and improvements in course of construction during the year.

(12) The report of the Superintendent of Buildings shall show the cost of erection, alteration and repair of all buildings during the year; and shall show also the general result of his inspection of buildings during the year. He shall report also the number of building permits issued by him.

(13) The Street Superintendent shall report upon the condition of the streets of the city and the improvements of the same during the year; and shall show what action was taken by him in the enforcement of ordinances pertaining to street obstructions and in regard to deviations from contract in the construction of public works.

(14) The report of the Chief Engineer of the Fire Department shall show the condition of the Fire Department and its apparatus, giving a detailed statement thereof; also the work of the department during the year.

(15) The report of the City Sealer of Weights and Meas-

ures shall show the amount of charges collected by him, and such other matters as are entrusted to him.

(16) The report of the City School Superintendent shall show the number and condition of the public schools, the number of teachers and their salaries and the number of pupils in attendance.

(17) The report of the Board of Directors of the Los Angeles Public Library shall show the condition of their trust for the year ending the 30th day of November of that year; the various sums of money received from the library fund and from other sources; for what purpose such money has been expended, and the amount so expended and the balance on hand; the number of books and periodicals on hand; the number added by purchase, gift or otherwise during the year; the number lost or missing; the number of visitors attending; the number of books loaned out, and the general character and kind of such books, with such information and suggestions as it may deem of general interest.

(18) The report of the Park Commissioners shall show the condition of the parks, with the kind, cost and expense of the improvements, including the entire cost and expense of the department for the year ending November 30th, last preceding.

### Annual Estimates.

Sec. 59. Every officer or board of the city shall make out and file with the City Auditor, on or before the 15th day of July in each year, an estimate of the expenses of his or its office or department for the year commencing on the 1st day of July preceding said report.

### Administration of Oaths and Affirmations.

Sec. 60. The Mayor, City Auditor, City Treasurer, and each member of the Council, and of each board and commission provided for in this charter, shall have the power to administer oaths and affirmations in any investigation or proceeding pending

before any of said officers or bodies, or concerning any demand on the City Treasury, and the City Clerk shall have the power to administer all oaths and affirmations required by the charter.

The City Council and each board and commission provided for in this charter shall have the power and authority to examine witnesses under oath and compel the attendance of witnesses and the production of evidence before such Council, board or commission, as the case may be, by subpoena, to be issued in the name of said City of Los Angeles, and to be attested by the City Clerk of said city. The City Clerk shall, upon the demand of the President of the City Council, or the presiding officer of any such board or commission, issue such subpoena in the name of said city, and attest the same with the corporate seal thereof, and shall in such subpoena direct and require the attendance of the witness or witnesses sought to be subpoenaed before the City Council or the respective board or commission requiring the issuance of said subpoenas at a time and place to be in said subpoenas specified.

The Chief of Police shall cause all such subpoenas to be served by some member of the Police Department upon the person or persons required to attend before the Council or board or commission in such subpoenas designated.

The City Council shall, from time to time, adopt ordinances providing suitable penalties for disobedience of such subpoenas, and the refusal of witnesses to testify before such Council, board or commission when required so to do.—[Amendment, 1903.]

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## ARTICLE V.

### OFFICIAL BONDS.

Sec. 61. The following named officers of said city shall respectively execute to said municipal corporation, bonds in the following sums, respectively, conditioned for the faithful discharge by them of the duties of their respective offices, to wit:

The bond of the City Auditor is fixed at $10,000.

The bond of the City Tax and License Collector is fixed at $100,000.

The bond of the City Assessor is fixed at $10,000.

The bond of the City Treasurer is fixed at $150,000.

The bond of the City Engineer is fixed at $10,000.

The bond of the City Attorney is fixed at $5,000.

The bond of the Water Overseer is fixed at $2,000.

The bond of the Street Superintendent is fixed at $10,000.

The bond of the Chief of Police is fixed at $5,000.

The bond of the Health Officer is fixed at $2,000.

The bond of the City Clerk is fixed at $5,000.

The bond of the City Sealer of Weights and Measures is fixed at $5,000.

Sec. 62. Each such official bond shall be executed by two or more sureties, who shall each be a resident of the city or county of Los Angeles, and the owner of real estate therein, valued over and above all incumbrances, upon the last city or county assessment roll, at not less than the aggregate amount for which he becomes responsible upon such official bonds. Each surety shall be approved as hereinafter set forth, and shall bind himself in a sum not less than $1,000.

The aggregate amount of the sums which the sureties on any of such bonds shall respectively bind themselves to pay, shall be at least double the sum in which the principal on such bond binds himself.

No such surety shall be held liable on such bond for a larger sum of money than that which he specifically binds himself to pay, together with such costs of action as may be allowed by the court on the recovery of judgment against him on such bonds.

Section 963 of the Political Code shall apply to the official bonds given under the requirements of this charter.

Each surety on any bond given under the provisions of this charter shall justify in double the amount for which he binds himself on such bond.

The bonds of all officers, after approval by the City Attorney, as to form, shall be approved by the Mayor and the Council,

and, after such approval, shall be filed with and remain in the keeping of the City Auditor; provided that the bond of the City Auditor shall be filed with and remain in the keeping of the City Clerk.

Sec. 63. The Council may, by ordinance, increase the amount of bond hereby required from any officer, but may not decrease the same; and may require a bond to be given by any officer not herein required to give a bond, and may fix its amount.

Sec. 64. If the bond of any officer should at any time become insufficient, the Council may notify and require him to give additional security, and, in case of his failure to do so within fifteen days, may declare his office vacant; and it shall be the duty of the Mayor at once to take into his charge all books and papers, money and other public property at the time in the hands or under the control of such officer so notified, and retain the same until such additional security is given, or the election or appointment and qualification of a successor. For the better enforcement of this section, the Mayor is authorized, at the cost of the city, to commence and prosecute, in his own name, all appropriate actions and proceedings.

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## ARTICLE VI.

### SALARIES OF OFFICERS.

Sec. 65. The officers of the city shall receive, in full compensation for all services of every kind whatever rendered by them, the following salaries, payable in monthly installments at the end of each calendar month:

The Mayor shall receive $3,600 per annum.
Each Councilman shall receive $1,200 per annum.
The City Clerk shall receive $2,400 per annum.
The City Auditor shall receive $3,000 per annum.
The City Assessor shall receive $2,400 per annum.
The City Treasurer shall receive $2,400 per annum.
The City Engineer shall receive $5,000 per annum.

The City Attorney shall receive $3,000 per annum.

The Chief of Police shall receive $3,000 per annum.

The Health Officer shall receive $3,600 per annum.

The City Tax and License Collector shall receive $3,000 per annum.

Each member of the Board of Public Works shall receive $3,600 per annum.—[Amendment, 1907.]

Sec. 66. The City Council shall, by ordinance, fix the salary of all other officers herein, or by ordinance hereafter created, whose salaries are not hereby fixed, or otherwise provided for.—[Amendment, 1903.]

Sec. 67. No officer of the city shall be compensated by fees or commissions, but only by a fixed salary, payable monthly; and such salary shall not be increased or diminished during his term of office or after his election or appointment and before the commencement of the term.

Sec. 68. No city officer shall retain any fee, recompense or compensation received by him for the discharge of any duty of his office from any person other than the city, but shall immediately pay over to the Treasurer of the city all such sums of money so received.

## ARTICLE VII.

### EDUCATIONAL DEPARTMENT.

Sec. 69. The government of the School Department of the city shall be vested in a Board of Education, to consist of seven members, to be elected as herein provided, to be called Members of the Board of Education, who shall serve without salary; provided, that the members of the present Board of Education shall hold and exercise their offices, with the powers and duties prescribed by the charter, until the election and qualification of the members of the first Board of Education elected from the city at large.—[Amendment, 1903.]

Sec. 70. The Board of Education shall elect one of its number President, and shall hold regular meeting at least once

in each month, and special meetings at such times as shall be determined by rule of said board. A majority of all the members shall constitute a quorum for the transaction of business, but a smaller number may adjourn from time to time. The board may determine the rules of its proceedings. Its sessions shall be public, and its records shall be open to public inspection. The board shall fill all vacancies occurring in that body until the next general municipal election.

Sec. 71. The Board of Education succeeds to all the property rights and to the obligations of the Board of Education of the City of Los Angeles heretofore existing, and it shall have sole power:

(1) To establish and maintain public schools, including high schools, to change, consolidate and discontinue the same, and to establish school districts, and to fix and alter the boundaries thereof.

(2) To appoint or employ and dismiss the City School Superintendent, a Deputy Superintendent, a Clerk and such teachers, janitors, school census marshals, mechanics, laborers and other employees as may be necessary to carry into effect the powers and duties of the board; to fix, alter and allow their salaries or wages, and to withhold, for good and sufficient cause, the whole or any part of the salary or wages of any person or persons employed as aforesaid.

(3) To make, establish and enforce all necessary and proper rules and regulations for the government of public schools, the teachers thereof, pupils therein, and for carrying into effect the laws relating to education; also to establish and regulate the grade of schools, and determine what text-books, course of study and mode of instruction shall be used in said schools.

(4) To provide for the School Department fuel and lights, water, blanks, blank books, printing and stationery; and to incur such other incidental expenses as may be deemed necessary by said board.

(5) To build, alter, repair, rent and provide school houses,

and to furnish them with proper school furniture, apparatus and appliances, and to insure against fire any and all such school property.

(6) To take and hold in fee, or otherwise, in trust for the city, any and all real estate, and personal property that may have been acquired, or may hereafter be acquired, for the use and benefit of the public schools of the city; and to sell or exchange and to lease any of such property; provided that the proceeds of any such sale or exchange shall be exclusively applied to the purchase of other lots, or the erection of school houses.

(7) To grade, fence and improve all school lots, and in front thereof to grade, sewer or pave and repair the streets, and to construct and repair sidewalks.

(8) To sue for any and all property belonging to or claimed by the said Board of Education, and to prosecute and defend all actions at law or in equity necessary to recover and maintain the full enjoyment and possession of said property, and to require the services of the City Attorney, free of charge, in all such cases.

(9) To determine annually the amount of money required for the support of the public schools, and for carrying into effect all the provisions of law in reference thereto; and, in pursuance of this provision, the board shall, on or before the 15th day of July of each year, submit, in writing, to the City Council a careful estimate of the whole amount of money to be received from the State and county, and the amount required from the city, for the above purposes, and the City Council shall, in each year, fix the percentage of taxes to be levied and collected for school purposes; provided that the amount to be thus levied for school purposes shall not exceed twenty cents on each one hundred dollars' valuation upon the assessment roll, and that when collected it shall be paid into the school fund.

(10) To establish regulations for the just and equitable disbursement of all moneys belonging to the school fund.

(11) To examine and approve, in whole or in part, in the manner provided in Section 212, every demand payable out of the school fund, or to reject any such demand for good cause.

(12) To discharge all legal incumbrances now existing, or which may hereafter exist, upon any school property.

(13) To prohibit any child under six years of age from attending the public schools.

(14) In its discretion to establish kindergarten schools for the instruction of children between the ages of five and six years, and industrial and manual training schools or departments.

(15) To receive and manage property or money acquired by bequest or donation in trust for the benefit of any school, educational purpose, or school property.

(16) And generally to do and perform such other acts as may be necessary and proper to carry into force and effect the powers conferred on said board, and to increase the efficiency of the public schools in said city.

Sec. 72. All contracts for building shall be given to lowest bidder thereof, offering adequate security, to be determined by the board after due public notice, published for not less than ten days in the official newspaper of the city. It shall be the duty of the board to furnish all necessary supplies for the public schools. All supplies, books, stationery, fuel, printing, goods, material, merchandise, repairing and every other article and thing supplied to or done for the public schools, or any of them, when the expenditure to be incurred on account of such matter may exceed five hundred dollars, shall be done or furnished by contract let to the lowest bidder after like public advertisement; provided, that the Board of Education may reject any and all bids under this section.

Sec. 73. Any member of the Board of Education, officer or other person officially connected with the School Department, or drawing a salary from the Board of Education, who, while connected or drawing such salary, upon investigation by the Board of Education, shall be found to be interested, either directly or indirectly, in, or to have gained any advantage or benefit from any contract, payment under which have been or are to be made, in whole or in part, from moneys derived from the school fund, or raised by taxation or otherwise for the support of the public

schools, shall forfeit his office, and the Board of Education shall thereupon declare such office vacant.

Sec. 74. The Board of Education shall, before the 30th day of June of each year, fix a schedule of salaries for teachers and employees of the School Department, to take effect on the 1st day of July following, and to remain in force during one year.

### School Superintendent.

Sec. 75. The Superintendent, with the approval of the Board of Education, may, for good and sufficient cause, provisionally suspend any teacher employed in the public schools of the city, until the next meeting of the Board of Education. It shall be the duty of the Superintendent to report to the Board of Education annually, and at such other times as it may require, all matters pertaining to the expenditures, income and condition and progress of the public schools of said city during the preceding year, with such recommendations as he may deem proper; to visit each school at least once a month; to observe and cause to be observed, such general rules for the regulation, government and instruction of the schools as may be established by the board; to recommend to the board the dismissal of teachers, stating the reasons therefor; to attend all sessions of the board, and inform it at each session of the condition of the public schools, school houses, school fund, and other matters connected therewith, and recommend such measures as he may deem necessary for the advancement of education in the city, and to acquaint himself with all the laws, rules and regulations governing the public schools in said city, and the judicial decisions thereon, and give advice connected with public schools, gratuitously, to officers, teachers, pupils and their parents and guardians.

### School Fund.

Sec. 76. The school fund shall consist of all moneys received from the State School Fund and County School Fund, and of all moneys arising from taxes which shall be levied annually by the City Council of the city for school purposes; of all moneys

arising from the sale, rent or exchange of any of the school property, and of such other moneys as may, from any source whatever, be paid into any school fund. The school fund shall be separate and distinct from all other moneys, and shall only be used for school purposes under the provisions of this charter. If, at the end of any fiscal year, any surplus remains in the school fund, such surplus money shall be carried forward to the school fund for the next fiscal year, and shall not be, for any purpose whatever diverted or withdrawn from said fund, except under the provisions of this charter.

Sec. 77. The said school fund shall be used and applied by said Board of Education for the following purposes, to wit:

(1) For the payment of the salaries or wages of the Superintendent, Deputy Superintendent, clerk, teachers, janitors, school census marshals, and other persons who may be employed by said board.

(2) For the erection, alteration, repairs, rent and furnishing of school houses.

(3) For the purchase money or rent of any real or personal property purchased or leased by said board.

(4) For the insurance of all school property.

(5) For the discharge of all legal incumbrances on any school property.

(6) For lighting the school rooms and the offices and rooms of the Superintendent and Board of Education.

(7) For supplying the schools with fuel, water, apparatus, blanks, blank books and necessary school appliances, together with books for indigent children.

(8) For supplying books, printing and stationery for the use of the Superintendent and Board of Education, and for the incidental expenses of the Department.

(9) For grading and improving all school lots, and for grading, sewering, planking, or paving and repairing streets, and constructing and repairing sidewalks in front thereof.

Sec. 78. All demands authorized by this article shall be

paid by the City Treasurer from the school fund; provided, that the said board shall not have power to contract any debts or liabilities, in any form whatsoever, against the said city, in contravention of this article, or exceeding in any year the income and revenue provided for the school fund for such year; but this provision shall not be construed to prevent the incurring of indebtedness for permanent improvements to be liquidated by the proceeds of municipal bonds issued by the City of Los Angeles in accordance with the general laws of the State for the purpose of defraying the cost of such permanent improvements.

Sec. 79. It shall be the duty of the Auditor of the County of Los Angeles, upon the first Monday in each month, and at such other times as he may deem proper, to certify in duplicate to the Superintendent of Schools of such county the amount of school moneys at that time in the county treasury, and the amount received during the previous month. The County Superintendent shall, upon the receipt of such certificates, indorse upon one of them the amount of such moneys to which the public schools of the city are entitled. The certificate so indorsed shall be at once returned to said Auditor, who shall direct upon the same the County Treasurer to pay the sum designated upon such certificate to the Treasurer of the City for the use of the school fund thereof.

Sec. 80. The Treasurer of said county shall thereupon pay to the Treasurer of said city the sum directed by the Auditor as above provided; and when said moneys are placed in the city school fund they shall be used in precisely the same manner as moneys raised by city school taxes in the city; provided that the entire revenue derived by the city from the State school fund and State school tax fund shall be applied by said Board of Education exclusively to the support of primary and grammar schools.

## ARTICLE VIII.

### LIBRARY DEPARTMENT.

Sec. 81. The public library and reading room, known as the "Los Angeles Public Library," is hereby continued in existence, and shall be free of access to all citizens of said city and the general public, subject to such rules and regulations for the government and management thereof as may at any time be adopted by the Board of Directors of said library, hereinafter provided.

Sec. 82. There shall be levied and collected annually, on all the taxable property in the city, as in other cases, a tax sufficient to maintain such library, not less than four cents on each one hundred dollars of the value of all real and personal property of the said city, as assessed for city purposes, for the purpose of establishing and maintaining said library, and purchasing or leasing such real and personal property, books, papers, publications, furniture, and fixtures, and erecting such buildings as may be necessary therefor. No indebtedness exceeding the amount of the annual levy for this purpose shall be incurred in any one year; provided, this limitation shall not be construed to prevent the incurring of indebtedness for permanent improvements, to be liquidated by the proceeds of municipal bonds issued by the City of Los Angeles, in accordance with the provisions of this charter and of the general laws of the State, for the purpose of defraying the cost of such improvements.—[Amendment, 1903.]

### DIRECTORS.

Sec. 83. The Mayor shall, immediately after his qualification under this charter, appoint, subject to confirmation by the Council, a board of five directors of said library, who shall serve without compensation and be known as "The Board of Directors of the Los Angeles Public Library." They shall be chosen from the citizens at large, without regard to sex or political opinions, but with reference to their fitness for said office, and no member of the City Council shall be a member of said board.—[Amendment, 1903.]

Sec. 84. Said directors shall hold office for four years, and until their successors are appointed and qualified. Those first appointed shall so classify themselves by lot that one shall go out of office at the end of one year, one at the end of two years, one at the end of three years, and two at the end of four years, and if any vacancy occurs the Mayor shall, subject to confirmation by the Council, fill the same by appointment for the unexpired term. —[Amendment, 1903.]

Sec. 85. Said directors shall, immediately after their appointment, meet and organize by the election of a president from among their number, and they may appoint the Librarian or any employe of the Library Department to act as clerk of the board. Such clerk shall keep a record and full minutes in writing of all their proceedings, and may certify to such proceedings or any portion thereof under his or her hand, to be verified by seal, if a seal be adopted and provided by the board for that purpose, and shall serve without extra compensation.—[Amendment, 1903.]

### Powers of the Board.

Sec. 86. Such board, by a majority of all the members, to be recorded in the minutes with the ayes and noes at length, shall have power to make and enforce all such by-laws, rules and regulations as may be necessary or expedient for its own guidance, and for the administration, government and protection of such library, reading-room and property; to determine the number of officers and assistants to be appointed for such library and reading-room, and to determine and define their duties; to fix the salaries and wages of all such employees; to appoint a Librarian and necessary assistant, and such other employees as may be necessary, and, for good cause, to remove them; to control and order the expenditure of all moneys at any time in the library fund, and order the drawing and payment of all moneys out of said fund for such expenditures or liabilities as are herein authorized, subject to the general provisions for the payment of demands on the City Treasurer, contained in Article XXI; to purchase or lease all necessary real property whereon to construct and thereon to con-

struct a library building or buildings, or to lease appropriate rooms, or a building or buildings, for such library, and to have the general supervision, care and custody of the grounds, rooms or buildings constructed, leased or set apart for that purpose, and generally to do all that may be necessary to carry out the spirit and intent of this charter in establishing a public library and reading-room; provided that all moneys received for such library shall be deposited in the treasury of the city, to the credit of the library fund, and shall be kept separate and apart from other moneys of the city, and shall be drawn from said fund upon demands authenticated by the signatures of the President and Clerk of the board. All libraries and reading-rooms heretofore established by said city, and all property, real and personal, thereto belonging, shall be turned over to the charge, custody and administration of the Board of Directors, with like powers and liabilities as if such library had been established under this charter.

### Who May Use the Library.

Sec. 87. The library and reading-room shall be forever free to the use of the inhabitants of the city, and persons sojourning therein, always subject to such reasonable rules and regulations as the Board of Directors may adopt, and said board may exclude from the use of said library and reading-room any and all persons who shall wilfully violate such rules, and said board may extend the privileges and use of such library and reading-room to persons residing outside the city upon such terms and conditions as said board may, from time to time, by its regulations prescribe.

### Donations and Conveyances.

Sec. 88. Any person desiring to make donations of money, securities or other personal property or real estate, shall have the right to vest the title to such money, personal property or real estate so donated in "The Board of Directors of the Los Angeles Public Library," hereby created, to be owned, held and controlled by such board when accepted, according to the terms of

the deed, gift, devise or bequest of such property; and, as to such property, the board shall be held and considered to be a special trustee thereof for the city. The title of all real property that may be purchased shall likewise be taken by said board in its name as such special trustee; and the City of Los Angeles may, in its discretion, by ordinance, set apart and order to be conveyed by said board, as special trustee, any part of the real property of the city not otherwise appropriated.

Sec. 89. The Board of Directors shall make the annual report and estimate hereinafter provided.

Sec. 90. The City Council shall have power to pass ordinances imposing suitable penalties for the punishment of persons committing injury upon such library, or the grounds or property thereof, and for injury to or failure to return any book belonging to such library.

## ARTICLE IX.

### POLICE DEPARTMENT.

Sec. 91. The Mayor, who shall be ex-officio a member and President of the Board, and four citizens, to be appointed by the Mayor, subject to confirmation by a majority of the Council, shall constitute the Board of Police Commissioners of the city. The appointive members of the board shall serve without compensation, and not more than two of them shall be members of the same political party. The appointive members of the board shall hold office for two years, and until their successors are appointed and qualified; provided, however, that the first members of the board appointed hereunder shall hold office until the first Monday in January, 1905, and until their successors are appointed and qualified.—[Amendment, 1903.]

Sec. 92. The Police Commissioners shall meet at least once a week.

Sec. 93. The Police Department shall consist of the Chief of Police and as many subordinate officers and such policemen and detective officers and employees as the Council shall, by ordinance,

determine. All appointments and removals in the Police Department shall be made by the Board of Police Commissioners, subject to such civil service regulations as are now or may hereafter be in force.—[Amendment, 1903.]

Sec. 94. The salaries of members and employees of the Police Department not herein elsewhere provided for shall be fixed by the Council by ordinance.—[Amendment, 1903.]

Sec. 95. The Police Commissioners shall prescribe the rules and regulations for the government of the police force, and fix and enforce the penalties for their violation.

Sec. 95a. The Board of Police Commissioners shall have power to grant permits, under and in conformity to the ordinances of said city, authorizing the City Clerk to issue licenses to persons desiring to engage in the sale of liquors, and to revoke any such permit when it shall appear to the board that the business of the person to whom such permit was given is conducted in an illegal, disorderly, or improper manner. Without such permit no person shall engage in the business of selling liquor.—[Amendment, 1903.]

Sec. 96. The Board of Police Commissioners, the Chief of Police, and other officers and employees shall have such further powers and be subject to such further duties as may be granted or imposed by ordinance.

## ARTICLE X.

### POLICE COURTS.

Sec. 97. The judicial power of the city shall be vested in a Police Court.

Sec. 98. Each of the Police Judges may hold such Court, and there may be as many sessions of the Police Court held at one time as there are Police Judges.

Sec. 99. The Police Judges shall have the power of examining magistrates and may commit offenders for trial in the proper Court.

Sec. 100. The Police Court shall have exclusive jurisdiction of the criminal proceedings for a violation of any city ordinance, and of all civil actions and proceedings arising out of a violation of such ordinances, and for the collection of any license required by any ordinance, except such actions and proceedings as fall within the jurisdiction of other courts under the provisions of the Constitution of this State.

Sec. 101. The Police Court shall also have exclusive jurisdiction of the following public offenses committed within the city (except when prosecuted by indictment or information): 1, petty larceny; 2, assault and battery; 3, breaches of the peace, riot, committing wilful injury to property, and all misdemeanors punishable by fine or by imprisonment in the county jail, or by both; 4, proceedings, respecting vagrants, lewd or disorderly persons.

Sec. 102. The Clerks of said Court shall remain at their respective courtrooms during business hours and for such reasonable time thereafter as may be necessary for the discharge of their duties.

Sec. 103. All fines, penalties and forfeitures collected by said Police Court shall be the property of the city, and shall be immediately deposited with the City Treasurer for the use of said city.

Sec. 104. The city shall furnish the necessary dockets, and all blanks and other books and papers and stationery necessary in the transaction of the business of the said Police Court. A complete record of all cases shall be entered in the docket of said court. Separate dockets shall be kept for the civil and criminal business.

Sec. 105. The said court shall have a seal, which shall be furnished by the city.

Sec. 106. The Police Court shall always be open for the transaction of business, except on Sundays and other legal holidays.

## ARTICLE XI.

### FIRE DEPARTMENT.

Sec. 107. The Mayor, who shall be ex-officio a member and President of the Board, and four citizens to be appointed by the Mayor, subject to confirmation by a majority of the Council, shall constitute the Board of Fire Commissioners of the city. The appointive members of the board shall serve without compensation, and not more than two of them shall be members of the same political party. The appointive members of the board shall hold office for two years, and until their successors are appointed and qualified; provided, however, that the first members of the board appointed hereunder shall hold office until the first Monday in January, 1905, and until their successors are appointed and qualified.—[Amendment, 1903.]

Sec. 108. The Fire Commissioners shall meet at least once a week.

Sec. 109. The Fire Department shall consist of a Chief Engineer and Assistant Chief Engineer, a secretary of the department, and as many engineers of the first class, engineers of the second class, relief engineers, captains of the first class, captains of the second class, lieutenants, drivers of the first class, drivers of the second class, drivers of the third class, tillermen, hosemen, laddermen, drivers of supply wagons, and other employees as the Council may, by ordinance, from time to time, determine to be necessary. All appointments and removals in the department shall be made by the Board of Fire Commissioners, subject to such civil service regulations as are now or may hereafter be in force.—[Amendment, 1903.]

Sec. 110. The salaries of all officers and employees of the Fire Department, not herein elsewhere provided for, shall be fixed by the Council, by ordinance.—[Amendment, 1903.]

Sec. 111. The Board of Fire Commissioners shall prescribe the rules and regulations for the government of the department, and fix and enforce the penalties for their violation.

Sec. 112. The Board of Fire Commissioners and the Chief

Engineer, and other officers and employees, shall have such other powers and perform such other duties as may be granted or imposed by ordinance.

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## ARTICLE XII.

### Park Department.

Sec. 113. All lands and real property located in the City of Los Angeles which have been heretofore, or which may be hereafter, set apart or dedicated for the use of the public as a public park or parks, shall forever remain to the use of the public as such park or parks, inviolate, and no part of said lands or real property shall ever be used or occupied for any other purpose.

Sec. 114. The Mayor, who shall be ex-officio member and President of the Board, and four citizens to be appointed by the Mayor, subject to confirmation by a majority of the Council, shall constitute the Board of Park Commissioners of the city. The appointive members of the Board shall serve without compensation, and not more than two of them shall be members of the same political party. The appointive members of the board shall hold office for two years, and until their successors are appointed and qualified; provided, however, that the first members of the board appointed hereunder shall hold office until the first Monday in January, 1905, and until their successors are appointed and qualified.—[Amendment, 1903.]

Sec. 115. The Park Commissioners shall meet at least once a month.

Sec. 116. The Park Department shall consist of as many officers and employees as the Council may, by ordinance, from time to time determine to be necessary. All appointments and removals in the department shall be made by the Board of Park Commissioners.

Sec. 117. The salary of all officers and employees of the Park Department shall be fixed by ordinance.

Sec. 118. The Board of Park Commissioners shall prescribe

the rules and regulations for the government of the department, and fix and enforce the penalties for their violation.

Sec. 119. The Board of Park Commissioners shall have such other powers and perform such other duties as may be granted or imposed by ordinance.

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## ARTICLE XIII.

### BOARD OF HEALTH.

Sec. 120. There is hereby established in and for the City of Los Angeles a department to be known as the Board of Health, to consist of five members, viz.:

The Mayor, who shall be ex-officio a member and President of the Board, and four citizens, to be appointed without regard to their political opinions, by the Mayor, subject to confirmation by a majority of the Council.

Three of said citizens shall be physicians in good standing and graduates of some reputable medical college.—[Amendment, 1903.]

Sec. 121. The appointed members of the board shall hold office for two years, and until their successors are elected and qualified, and shall serve without compensation. All vacancies shall be filled for the unexpired term only. Any appointed member failing to qualify within ten days after his appointment shall be deemed to have declined the office, and a new appointment shall be made. Three members shall constitute a quorum for the transaction of business.

### Health Office.

Sec. 122. The Board of Health shall be provided by the City Council with a suitable office, in which it shall hold its official meetings once a month, or when requested by three members of the board.

Sec. 123. The Board of Health shall have such general supervision as may be provided by ordinance of all matters ap-

pertaining to the sanitary condition of the city, including jails, hospitals and all public health institutions.

### Health Officer.

Sec. 124. The board shall appoint and, for good cause, may remove a Health Officer who shall also act as City Physician, and whose duties as such shall be defined by ordinance. He shall be a graduate of a reputable medical college, and shall have practiced medicine at least seven years, and shall have been a citizen and resident for two years in this city, and have his license to practice medicine recorded with the County Clerk of Los Angeles county, in accordance with the laws of the State of California regulating the practice of medicine. He must reside within the city limits and devote his entire time to the duties of his office. The Board shall appoint all assistants to said Health Officer, and all employees in the Health Department, the number of such assistants and employees and their compensation to be fixed from time to time by ordinance.—[Amendment, 1903.]

Sec. 125. The Health Officer shall be the executive officer of the board, and he shall see that all ordinances in respect to the public health and the rules and regulations of the Board of Health are enforced; and shall receive all complaints of the violations of such ordinances, rules and regulations, and investigate the same and act thereon. He shall make to the board an annual report of the affairs of his office, including mortuary and other statistics, with such general observations as in his judgment might benefit the sanitary condition of the city. He shall in person visit once in each quarter all the public institutions in the city under the charge of the Health Department, and twice in each year he shall visit every public school in said city; during such visit he shall examine the buildings in regard to the manner in which they are lighted, ventilated, heated, and particularly in regard to their sanitary condition. At the meeting of the board in the months of January, April, July and October, he shall report to the board the result of his examinations. He shall also act as City Physician, whose duties shall be defined by ordinance.

### QUARANTINE.

Sec. 126. Whenever it shall be certified to the Board of Health by the Health Officer that any building or part thereof is unfit for human habitation by reason of its being so infected with disease, or from other causes, as to be likely to cause sickness among its occupants, said board may issue an order, and cause the same to be affixed conspicuously on the building or in front thereof and to be personally served upon the owner, agent or lessee, if the same can be found, requiring all persons therein to vacate such building for the reasons aforesaid, to be stated therein. Such building, or part thereof, shall within ten days thereafter be vacated or within such shorter time, not less than twenty-four hours, as in said notice may be specified; but said board, if it should become satisfied that the danger from the building or parts thereof has ceased to exist, may revoke said order, and it shall thenceforth become inoperative.

Sec. 127. Every physician in the city shall report to the Health Officer in writing every patient he shall have sick of typhus, ship or yellow fever, Asiatic cholera, leprosy, smallpox, diphtheria, or scarlet fever, and every death from such disease immediately after it shall have occurred. Also every householder in said city shall forthwith report in writing, or otherwise, to the Health Officer the name of every inmate of his or her house whom he or she shall have reason to believe is sick of typhus, ship or yellow fever, leprosy, cholera or smallpox, and any deaths occurring at his or her house from such disease.

### INFECTIOUS DISEASES.

Sec. 128. The Health Officer shall report to the Superintendent of the Public Schools the names and residences of every person sick of typhus, ship or yellow fever, Asiatic cholera, smallpox, leprosy, diphtheria or scarlet fever, he may deem dangerous to the public health; and it shall be the duty of the Superintendent of Public Schools when so notified of the residence of any person sick of any of the diseases enumerated to refuse admittance to the public schools of any member of a family, one or

more of whose inmates are sick of any of the aforesaid diseases; provided that the parties excluded shall be readmitted upon presenting a certificate from the Health Officer that there is no longer any danger from contagion.

Sec. 129. No person shall drive or use any vehicle, or suffer or permit any vehicle under his or her charge or control, to be driven or used for the conveyance, transporation or removal of any person infected with the smallpox, or the body of any person who has died of smallpox, without the written consent of the Health Officer; also no person shall use or drive, or suffer or permit any vehicle authorized by the written consent of the Health Officer, to convey, transport or remove persons infected with the smallpox, or the bodies of persons who may die of the smallpox, to be used or driven for the conveyance, transportation or removal of persons uninfected with smallpox, without the written consent of the Health Officer.

Sec. 130. Whenever a case of smallpox, Asiatic cholera or yellow fever is reported to the Health Officer, he shall immediately visit the premises where the person is, and the said Health Officer, upon personal inspection, shall, in cases of smallpox, Asiatic cholera or yellow fever, immediately cause to be erected a yellow, or quarantine flag in a conspicuous place on said premises, or put upon the doorway of houses infected with such diseases a placard setting forth the fact, the same to remain during the continuance of the disease on said premises.

Sec. 131. The Board of Health may appoint and remove at pleasure a physician and nurses for the hospital or hospitals of the city when, in their judgment, it may be necessary. The salary for the said officers shall be provided for in the same manner as for other officers of the board.

### Smallpox Hospital.

Sec. 132. No person shall remove a smallpox patient from any house or place within the limits of the city to any house or place without the permission of the Health Officer.

The said officer, with the approval of the Board of Health,

may cause to be removed to the hospital of the city provided for that purpose any and all persons affected with smallpox from within such houses as cannot be properly quarantined.

The Board of Health, whenever and at such times as by them it shall be deemed necessary, may, by proclamation, require all railroad cars or other public conveyances bound for this city, before the same shall land or stop at any depot or landing or stopping place therein, to stop or touch at any or either of the sites, places or boundaries so selected and established for quarantine purposes, and leave all such immigrants, travelers or persons, and all such sick, diseased or unclean persons, with their stores and baggage, as in the opinion of the officers stationed at such quarantine sites, places or boundaries shall be deemed proper on account of the existing or general report of cholera, smallpox, or any contagious disease or diseases apprehended to endanger the health of the city.

Sec. 133. The said board shall make such rules and regulations for the government of the quarantine or health of the city as from time to time it shall deem necessary, and the physicians or health officers in charge of any quarantine station or place shall have power to make and enforce such regulations as may be necessary for the proper management and conducting thereof; and it shall be the duty of all persons in quarantine, and all agents, officers, policemen or others employed by the city about said quarantine stations or places, to carry out and obey the same.

Sec. 134. The Board of Health shall cause to be kept a record of all births, deaths, interments and cremations occurring in said city; such record must be kept in the Health Office, and shall be open for the inspection of any person during office hours. All physicians and midwives in said city shall report to the Health Officer, on or before the 5th of each month, all births occurring in his or her practice during the previous month. Any physician or midwife failing to make such report shall be guilty of a misdemeanor.

Sec. 135. No person shall deposit in any cemetery, cremate

or inter in said city a human body without first having obtained and filed at the Health Office a certificate signed by a licensed physician or Coroner, setting forth as near as possible the name, age, sex, color, place of birth, occupation, date, locality and cause of death of the deceased, and obtained from the Health Officer a burial permit. Physicians, when deaths occur in their practice, must give the certificate herein mentioned, unless the physician believes such death to be a proper case for investigation by the Coroner, nor shall any human body be removed or disinterred without the permit of the Board of Health or Health Officer or by order of the Coroner.

Sec. 136. Superintendent of cemeteries within the boundaries of the city must return to the Health Officer on each Monday the names of all persons interred, cremated or deposited within their respective cemeteries for the preceding week.

Sec. 137. It shall be unlawful to disinter or exhume from a grave, vault or other burial place within the limits of said city the body or remains of any deceased person, unless a permit for so doing shall have been first obtained from the Health Officer. Nor shall any body or remains disinterred, exhumed or taken from the grave, vault or other place of burial or deposit be transported in or through the streets or highways of said city unless the person or persons transporting such bodies or remains shall first obtain from the Health Officer a permit in writing therefor. When an applicant for a permit to disinter a body shall desire to remove said body beyond the limits of said city, and shall so state on making application, the permit, if the same be issued, shall include the right to disinter and remove. Said permit shall accompany the body or remains.

Sec. 138. The permits in the last section may be granted, in the discretion of the Board of Health, under such general restrictions and conditions as the board may prescribe. The Health Officer shall prepare a book of blank permits, in proper form and consecutively numbered, containing stubs on which, as well as in the permit, shall be entered a record of the transaction, giving the name, age, sex, nativity, place of burial and destination of re-

mains to be transported or removed; and upon granting such permit for the removal of a body beyond the State limits he shall require to be paid to him the sum of ten dollars therefor, to be paid into the treasury for the use and benefit of the general fund of said city.

Sec. 139. Any person or persons who shall disinter, exhume, transport or remove, or cause to be disinterred, exhumed, transported or removed from a grave, vault or other receptacle or burial place, the remains of a deceased person, without a permit therefor from such Health Officer, or who shall transport or cause to be transported on or through the streets or highways of said city the body or remains of a deceased person, which has been exhumed or disinterred without such permit, shall be guilty of a misdemeanor.

Sec. 140. Nothing in this charter contained shall be taken to apply to the removal of the remains of a deceased person from one place of interment to another place within the same cemetery.

Sec. 141. No person shall receive for transportation or shall transport upon any boat, vessel or railroad car, or public or private conveyance, the body of any person who has died within the limits of said city, unless said body is accompanied by a permit for such transportation from the Health Officer. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

Sec. 142. Any member of the Board of Health or the Health Officer may administer oaths on business connected with the Health Department.

Articles XIV, XV, XVI and XVII of the charter are hereby repealed; provided, however, that such repeal shall not affect any proceedings that may be pending under any of said articles at the time this amendment goes into effect.—[Amendment, 1903.]

## ARTICLE XIV.

[Amendment, 190[illegible].]

### Department of Public Works.

Section 143. There is hereby created a department of said City, to be known as the "Department of Public Works," which shall be under the management and control of a board of three commissioners, to be known as "The Board of Public Works."

(a) Said commissioners shall be appointed by the mayor, subject to confirmation by a majority of the council. All such appointments shall be so made that not more than two members of the board shall, at any one time, belong to the same political party. Each of said commissioners shall receive an annual salary of $3600, payable in equal monthly installments, and shall give a bond to the city in the sum of $10,000, conditioned for the faithful discharge of the duties of his office.

(b) The term of office of members of the board of public works shall be four years. The term of office of the three members first appointed hereunder shall commence on the first Monday in January, 1906, and said three members shall so classify themselves by lot that one shall go out of office at the end of two years, one at the end of three years, and one at the end of four years thereafter. If any vacancy occurs, the mayor shall fill the same by appointment for the unexpired term.

(c) The commissioners shall organize by electing one of their members president, who shall hold his office for one year, and until his successor is elected, unless his membership on the board sooner expires.

(d) The board shall maintain an office and prescribe office hours for the convenience of the public. It shall hold regular stated meetings at least once in each week. The commissioners shall devote all their time during official business hours to the duties of their office.

(e) The Board shall appoint a secretary, not a member of the Board, who shall receive an annual salary of $2,400, payable in equal monthly installments. He shall keep a record of all

its transactions, specifying therein the names of the commissioners present at all the meetings, and giving the ayes and noes upon all votes. He shall post and publish all orders resolutions and notices, which the Board shall order to be posted or published, and shall perform such other duties as are herein or may be, by order of the Board, imposed upon him.—[Amendment, 1907.]

(f) The three members of the board of public works and the secretary thereof shall be officers of the municipality in addition to the other officers thereof provided for herein.

(g) The board of public works shall appoint an inspector of public works, who shall perform such duties as the board may prescribe. The person holding the office of street superintendent at the time of the first organization of the board shall be entitled to take and hold, and shall be appointed by said board to the office of inspector of public works for a term ending on the first Monday in January, 1907. The person so appointed shall during such term receive a salary at the rate of $3000 per annum, payable in equal monthly installments. The successors in office of the inspector of public works first appointed as herein provided, shall be appointed from the members of the board of public works, and shall serve without extra compensation. On the first Monday in January, 1907, or upon the prior occurrence of a vacancy in the office of inspector of public works, the board shall appoint one of their number, other than the president, inspector of public works, who shall hold such office for one year, and until his successor is appointed, unless his membership on the board sooner expires.

(h) The Board of Public Works shall appoint and employ a civil engineer of not less than five years professional experience, who shall be designated as the City Engineer. He shall receive a salary of $5,000 per annum, and shall hold office at the pleasure of the Board. He shall perform such civil engineering and surveying necessary in the prosecution of public work done under the direction or supervision of the Board as said Board may require. He shall make such certificates and reports upon

the progress of such work, and shall make such surveys, inspections, and estimates, and perform such other surveying or engineering work, as may be required by said Board or by the City Council. He shall have all the powers and perform all the duties that are now or may hereafter be conferred or imposed by law, or by Ordinance, upon the City Engineer. He shall devote his entire time to the duties of his office, and shall receive no compensation in addition to his salary.—[Amendment, 1907.]

(i) The board of public works shall, subject to such civil service regulations as are now or may hereafter be in force, appoint and employ and for good cause remove, such superintendents, inspectors, clerks and employees as the city council shall, by ordinance from time to time, prescribe, and the board shall establish all necessary rules and regulations for the exercise of the powers conferred in this article, for the government of the department of public works, and for the regulation and conduct of its officers and employees, and may require of any or all of such officers and employees, except laborers, adequate bonds for the faithful performance of their respective duties.

Section 144. The board shall, from and after the first organization thereof, be the successor in office of the street superintendent and of the superintendent of buildings, and shall have all the powers and perform all the duties that are now or may hereafter be conferred or imposed by law upon said officials, respectively, and the board shall perform such other duties as are herein or may be, by ordinance, imposed upon it.

Section 145. (a) The board of public works shall have and exercise all the powers and duties that are now or may hereafter be conferred or imposed by law upon the city council relating to:

1. The advertising for, and inviting of proposals or bids for doing any work ordered by the city council to be done in or upon any streets, avenues, lanes, alleys, courts or places, or in the construction of any sewer or drain, ordered by the city council in or over the right of way granted or acquired for such purpose;

2. The examining, considering, and declaring of such proposals or bids;

3. The awarding, letting and re-letting of contracts for doing any of said work so ordered, the giving notice of such award, the rejection of proposals or bids for doing such work, and the granting of extensions of time for the completion thereof by the contractor therefor.

4. The approval and the fixing of the amount of bonds required to be given by contractors prior to, or at the time of executing contracts for such work, and the fixing of the time within which such work shall be commenced and completed.

The board shall also have and exercise all of the powers and duties that are now or may hereafter be confererd or imposed by law upon the mayor relating to the approval of the award of contracts for any of the work mentioned in this section.

The board of public works shall also have and exercise all of the powers and duties that are now or may hereafter be conferred or imposed by law upon any commission provided for by law to assess the benefits, damages and costs incident to a proposed change of grade of any public street, alley, lane or court.

(b) The president of the board of public works shall have and exercise all of the powers and duties that are now or may hereafter be conferred or imposed by law upon the mayor relating to the approval and fixing of the amount of bonds required to be given by contractors prior to, or at the time of executing contracts for such work.

(c) The secretary of the board of public works shall have and exercise all the powers and duties that are now or may be hereafter conferred or imposed by law upon the city clerk or the clerk of the city council relating to:

1. The receipt, care and custody of proposals or bids for doing any of the work mentioned in this section.

2. The care and custody of all checks and bonds accompanying such proposals or bids.

Section 146. The board of public works shall have charge,

superintendence and control, under such ordinances as may from time to time be adopted by the city council:

1. Of all public ways, streets, avenues, boulevards, lanes, alleys, places and courts, now open or which may hereafter be opened in the city of Los Angeles; of the manner of their use and occupation; of all work and improvements done in, on, over or under the same, and of all excavations made in or under the same.

2. Of the design, construction, maintenance and use of all sewers, drains and storm drains of the city, and of all connections therewith;

3. Of the cleaning, sprinkling, maintenance, repair, and lighting of all public ways, streets, avenues, boulevards, lanes, alleys, places and courts; the lighting of all public parks, and the lighting, heating and ventilating of all public buildings belonging to the city.

4. Of the design, construction, alteration, repair, maintenance and care of all public works and improvements, and of all public buildings belonging to the city;

5. Of the disposal of garbage, sewage and street refuse;

6. Of all public utilities that are now or may hereafter be owned, controlled or operated by the city, other than water works.

Sec. 146½. The Board of Public Works shall have power to acquire and take by purchase, condemnation or otherwise, in the name of the city any and all property that may be necessary or convenient for the construction or completion of any public work or improvement, the construction or completion of which the Board of Public Works has charge, superintendence, or control, and the cost of which is to be paid from the proceeds of bonds issued and sold by said city.—[Amendment, 1907.]

Section 147. The board of public works shall have charge of the enforcement of all ordinances relating to the construction, alteration, repair, demolition or removal of buildings and structures in the city; and to the arrangement, alteration and repair,

use and
and ele operation of all heating, plumbing, lighting, ventilating
Sectrical and mechanical appliances therein.
of labo· 148. All contracts for the performance or furnishing
any ser, materials or supplies, required for the execution of
superinvice of which the Board of Public Works has charge,
tion of endence or control, or for the construction or comple·
pletion any work or improvement of the construction or com-
trol, exof which said Board has charge, superintendence or con-
of whiccept public work or improvements, the cost or expenses
tion to h are to be paid by assessment upon property in propor-
shall befrontage or benefits and except as hereinafter provided,
in the f let and entered into in behalf of the city by the Board
Evollowing manner:
passed ry such contract shall first be authorized by resolution
Councilby a vote of two-thirds of the members of the whole
as herei The Board shall, except in cases of urgent necessity,
thorizinnafter provided, upon the passage of the resolution au-
in its og such contract, cause a notice to be posted conspicuously
general fice and published one or more times in a newspaper of
geles, incirculation printed and published in the City of Los An-
the labcviting sealed bids for the performance or furnishing of
shall rer, service, materials or supplies required. Said notice
certain huire the bids to be filed with the Board at or before a
tain a hour of a day to be specified in the notice, and shall con-
plies to eneral description of the work, service, materials or sup-
to be gbe performed or furnished, and the amount of the bond
shall reven for the faithful performance of the contract, and
Board fer to plans and specifications on file in the office of the
rials or or full details and description of said work, service, mate-
Saisupplies.
check ce notice shall require each bid to be accompanied by a
Presider rtified by a responsible bank, payable to the order of the
of the ast of the Board for an amount not less than five per cent.
said amgregate sum of the bid, or by a satisfactory bond for the
enter inount and so payable, as a guarantee that the bidder will
o the proposed contract if the same is awarded to him,

and the form and manner of making bids may, in all other respects, be prescribed in said notice, and no bid shall be considered unless the same is accompanied by said check or bond and is made in the prescribed form and manner. On the day and at the hour specified in the notice inviting bids the Board shall meet and in open session, examine and publicly declare the bids received. The Board shall award the contract to the lowest regular, responsible bidder, or shall reject all bids. The Board shall reject the bid of any party who has been delinquent or unfaithful in the performance of any former contract with the city, and shall reject all bids other than that of the lowest regular, responsible bidder. Upon rejecting any bids the Board shall return to the proper parties the checks accompanying the rejected bids. The check accompanying the accepted bid shall be held by the secretary of the Board until the contract for performing the work or service or furnishing the materials or supplies proposed to be done or furnished has been entered into. If the successful bidder fails to enter into the contract, or to execute the bond required for the faithful performance thereof, within ten days after the same is awarded to him, then the certified check accompanying his bid shall be presented for payment and collected, and the amount thereof paid into the general funds of the city. Every contract entered into by the Board shall first be approved as to form by the City Attorney, and shall contain detailed specifications and plans of the work or service to be done, the manner in which it is to be performed, and the quantity and kind of materials or supplies to be used or furnished, or shall refer to such specifications and plans on file in the office of the Board. Said contract shall be signed on behalf of the city by the President or by two of the members of the Board and by the other contracting party. The contractor shall enter into and deliver to the Secretary of the Board a bond in the sum named in the notice inviting bids, conditioned for the faithful performance of the contract and executed by the contractor and by a responsible surety company or by two or more sufficient sureties approved by the Board.

When any repairs, alterations, work or improvement shall be deemed of urgent necessity by the Board a contract for the performance or furnishing of the labor, materials or supplies required therefor may be made by the Board in behalf of the city, in writing or otherwise, without advertising for or inviting bids; provided, that if the contract for the furnishing of the labor, materials or supplies so required involves an expenditure of more than $500, the resolution of the Council authorizing the same, shall, before it takes effect, be approved by the Mayor: provided, however, that authorization or approval by the Council or the Mayor shall not be required in the case of any contract proposed to be made by the Board after advertisement for and inviting bids, as above provided, for the performance or furnishing of labor, materials or supplies required for the construction or completion of any work or improvement, of the construction or completion of which the said Board has charge, superintendence or control, and the cost of which is to be paid from the proceeds of bonds issued and sold by the city; and provided, further, that authorization or approval by the Council or Mayor, or advertisement for or inviting bids shall not be required in the case of any contract proposed to be made by the Boards for the performance or furnishing of labor, materials or supplies required as aforesaid, when such contract does not involve an expenditure of more than five hundred dollars.—[Amendment, 1907.]

Section 149. All instruments, warrants, records, certificates, notices, or other documents required to be signed or executed by the board of public works shall be signed on order of the board by the president or by two members thereof.

Sec. 150. The Board of Public Works shall present to the City Council at its meeting in the second week of December, in each year, a report for the year ending on the thirtieth day of November next preceding, which shall show the amount of money received from the sale of bonds, the purposes for which such money has been expended, the amount so expended, and the balance on hand in each bond fund, and also, such informa-

tion and suggestions as it may deem of general interest; and the Board of Public Works shall also, on or before the tenth day of each month make out and present to the City Council a similar statement of all expenditures during the preceding month of the moneys derived from the sale of bonds.—[Amendment, 1907.]

Sec. 151. When the construction or completion of any public work or improvement, the cost of which is to be paid out of the proceeds of the sale of bonds, is to be carried on outside the City of Los Angeles, and the Board of Public Works shall deem it necessary or convenient that any part of the money to be expended for the cost of such work or improvements shall be disbursed at any point or points outside said city, said Board may appoint a disbursing agent, whose duty it shall be to disburse such money, in the manner hereinafter specified. The said disbursing agent shall enter into and deliver to the said Board a bond payable to the city, in a sum to be fixed by said Board, conditioned for the faithful performance of his duties, executed by himself, and by a responsible surety company, or if required by the Board, by two or more sufficient sureties approved by the Board, and said Board may, from time to time, require from said disbursing agent, a new bond, or such additional bond as it may deem proper. Said Board shall, after the execution and delivery of such bond, by resolution, authorize the payment and delivery to said disbursing agent of such sum of money as it may deem proper, and said sum shall thereupon be paid to said disbursing agent by the City Treasurer upon a demand approved by the Board as in other cases out of the fund from which the cost of said work or improvement is to be paid, and the receipt of said disbursing agent therefor shall release the City Treasurer from all liability for the money so paid. Provided, however, that said Board shall not authorize the payment to said disbursing agent of any money which together with the moneys already paid to him and remaining unexpended as herein provided, shall exceed fifty per cent of the amount of the bond of said disbursing agent.

That said disbursing agent shall thereafter pay out said money as may be required in the prosecution of said work for services or for material and supplies, but no money shall be paid by him except upon order of said Board of Public Works and upon vouchers or demands certified to be correct by the officer or agent of the city under whose direction the services are rendered or the materials or supplies used.

Said disbursing agent shall, on or before the tenth day of each calendar month, and at such other times as may be required by said Board of Public Works, render to said Board an account showing the amount of money in his hands on the first day of the preceding calendar month, all amounts received, and all moneys disbursed by him during said preceding month, and the amount of money remaining in his hands on the last day of said preceding month.

Said disbursing agent shall perform such other duties and comply with such rules and regulations as the Board of Public Works may prescribe. Said agent shall be exempt from the provisions of the Civil Service, and shall receive such salary as the Council by Ordinance may fix.—[Amendment, 1907.]

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## ARTICLE XVIII.

[Amendment, 1903.]

### Water, Water Rights and Water Works.

Sec. 190. The City of Los Angeles shall continue in the ownership and enjoyment of all the rights to the water of the River Los Angeles heretofore vested in it, its predecessors or predecessor, including the Pueblo of Los Angeles, and is hereby declared to have the full, free, and exclusive right to all the water flowing in the said river at any point from its source or sources, to the intersection of said river with the southern boundary of said city, and also the ownership of and the right to develop, economize, control, use, and utilize all waters flowing beneath the

surface in the bed of said river at any point or points between the points of termini above named.

Sec. 191. The said city shall not convey, lease, or otherwise dispose of its rights in the waters of said River Los Angeles, or any part thereof, or grant, or lease to any corporation or person, any right or privilege to use, manage, or control the said waters, or any part thereof, for any purpose, public or private. No other water or water rights now or hereafter owned by said city shall be conveyed, leased, or otherwse disposed of, without the assent of two-thirds of the qualified electors of said city voting upon such proposition at an election, general or special, at which such proposition shall be lawfully submitted; provided, however, that this section shall not be construed to prevent the ordinary sale and distribution, by the city, in the manner hereinafter prescribed, of the waters belonging to said city, to the inhabitants thereof or persons doing business therein for domestic and irrigating uses, and for manufacturing and business purposes, other than water power.

Sec. 192. There is hereby created, for the purpose of managing and controlling all waters and water rights that are now, or may be hereafter, owned by the City of Los Angeles, a department of said city to be known as the "Water Department," which shall be under the management and control of a Board of Water Commissioners.

(a) Said Board shall consist of five members, who shall be appointed by the Mayor, subject to confirmation by a majority of the Council.

(b) No person shall be appointed a Water Commissioner who shall not have been an elector of the City of Los Angeles for at least five years next preceding his appointment, and the appointments of Water Commissioners shall be made so that not more than three members of the board shall, at any one time, belong to the same political party.

(c) The term of office of the Water Commissioners shall be four years. The five commissioners first appointed hereunder shall so classify themselves by lot that one shall go out of office

at the end of one year, one at the end of two years, one at the end of three years, and two at the end of four years, and if any vacancy occurs, the Mayor shall, subject to confirmation by the Council, fill the same by appointment for the unexpired term.

(d) The Commissioners shall organize by electing one of their members president, who shall hold his office for one year and until his successor is elected, and they may appoint a secretary, who is not a member of the board, and fix his compensation.

(e) The President of the Board of Water Commissioners shall be the executive officer of the Water Department, and shall perform such duties as the board may prescribe. He shall devote so much of his time to the duties of his office as may be necessary for the proper supervision and direction of the business of the Water Department. The secretary of the board shall keep a record of the proceedings of the board, and may certify such proceedings under his hand, to be authenticated by seal, if a seal be adopted and provided by the board for that purpose, and shall perform such other duties as the board may prescribe.

(f) The Board shall maintain an office, and prescribe office hours for the convenience of the public. The Board shall hold a regular stated meeting once in each week. The members of the Board shall serve without compensation, except that the President of the Board shall receive a salary of $3000 per annum, payable in equal monthly installments.

(g) The Board of Water Commissioners shall have power:

To manage and control all waters, water rights, and water bearing lands, and all water works, reservoirs, zanjas, and ditches belonging to the city.

To construct, operate, maintain, and extend waterworks, dams, reservoirs, zanjas, ditches, canals, and other means for supplying the city and its inhabitants with water, and to acquire and take by purchase, condemnation or otherwise, and, in its own name, to hold as special trustee for the city, any and all property, including waters and water rights, situated within or without the

limits of the city, other than the waters of the River Los Angeles, that may be necessary or convenient for such construction, operation, maintenance, or extension.

To regulate and control the use, sale and distribution of water belonging to the city, the collection of water rates, and the granting of permits for connections with said waterworks, zanjas, or ditches, and to fix the rates to be charged for such connections; and, subject to the approval of the City Council, to fix the rates to be charged for water, and to prescribe the time and manner of payment of the same.

To appoint, employ, and for good cause, to remove the Superintendent of Waterworks, the Water Overseer, and such assistants, employes and laborers as the Board may deem necessary; to fix their compensations, prescribe their duties, and to require of any or all of them adequate bonds for the faithful performance of such duties.

To sue and be sued, and to require the services of the City Attorney, free of charge, in all cases to which the board is a party.

To control and order the expenditure of all moneys received from the sale or use of water; provided, that all such moneys shall be deposited in the treasury of the city to the credit of a fund to be known as the "Water Revenue Fund," and shall be kept separate and apart from other moneys of the city, and shall only be drawn from said fund upon demands authenticated by the signatures of the President and Secretary of the Board, or, in the absence of the President, by the signatures of two members and the Secretary of the Board, except that the City Council, at the time of fixing the general tax levy, may, in its discretion, by ordinance, apportion and set apart, out of the moneys then in said Water Revenue Fund, an amount sufficient to meet all sums coming due for interest or principal, or for interest and principal, upon all outstanding waterworks bonds, before the time for fixing the next general tax levy, and the City Treasurer shall use the money so apportioned to make such payment, and for no

other purpose; and if there shall be a surplus remaining, the same shall forthwith be retransferred into said Water Revenue Fund.

(h) None of the money in said Water Revenue Fund or coming under the control of said Board, shall be appropriated or used for any purpose or purposes other than the following, to wit:

First: For the necessary expenses of conducting the Water Department, of operating the waterworks, and of making all current and ordinary extensions, betterments and repairs.

Second: For extraordinary improvements of and betterments to the property, works, and systems of supply and distribution of the Water Department, including the purchase of necessary lands, water rights, and other property.

Third: The payment, as above provided, of installments of interest or principal, or of interest and principal coming due upon outstanding waterworks bonds.

Provided, however, that said board may, in its discretion, so fix the water rates as to produce a revenue sufficient only for the purpose of defraying the necessary expenses of conducting the Water Department, of operating the waterworks, and of making all current and ordinary extensions, betterments and repairs, and for no other purpose.

(i) The said Board shall also have power, by a resolution adopted by a majority of all of its members, and recorded in the minutes with the ayes and noes at length, to make and enforce all such reasonable by-laws, rules, and regulations as may be necessary for its government, for the administration of the Water Department, and for the exercise of the powers conferred by this article; provided, that no such rule, by-law, or other act of the Board fixing water rates, or prescribing the time or manner of payment thereof, shall be effective until the same shall be approved by the City Council, and thereafter published for at least three days in a daily newspaper printed and published in the City of Los Angeles.

(j) Three members of the Board of Water Commissioners shall constitute a quorum for the transaction of business; but no contract shall be made, no bill audited, nor any act done involving the expenditure of money, or the incurring of a debt, unless three members of the Board vote in favor thereof.

The Board shall not make any contract or expenditure for supplies, goods, materials, machinery or merchandise, involving the sum of more than five hundred dollars, unless it shall first have caused a notice to be published in a daily newspaper, printed and published in the City of Los Angeles, inviting proposals to furnish the same. And the contract therefor shall be let to the lowest responsible bidder who shall furnish security for its performance, satisfactory to the Board; provided, that the Board may reject any and all bids.

(k) The Board of Water Commissioners shall present to the City Council, at its meeting in the second week of December in each year, a report for the year ending on the thirtieth day of November next preceding, which shall show the amount of money received from all sources, the purposes for which such money has been expended, the amounts so expended, and the balance on hand; also the nature and condition of the property held by the board, with such information and suggestions as it may deem of general interest; and the Board shall also, on or before the tenth day of each month, make out and present to the City Council a similar statement of all receipts and expenditures during the preceding calendar month.

(l) As soon as practicable after the first Board of Water Commissioners appointed hereunder shall take office, the City Council shall cause to be conveyed to said Board, as special trustee for the city, all property, real and personal, belonging to the city (except the water and water rights mentioned in section 190 of this charter), that is now or may hereafter be used, required, or convenient in the operation, maintenance, or extension of a system of waterworks for supplying the inhabitants of the City of Los Angeles with water, and in protecting the sources of such water supply from diversion or pollution.

(m) The board may lease for terms not exceeding three years, any or all of the lands by this article placed under its control for agricultural or other purposes, which shall not conflict with the beneficial use of said lands by the city for the purposes for which they are held by said Board; and the Board may sell, from time to time, such personal property placed under its control, as shall not be longer necessary or suitable for the use of the Water Department. No real property nor any rights or interests in real property held by said board shall be sold, leased or otherwise disposed of, or in any manner withdrawn from its control, save as above provided, unless by a written instrument duly authorized by ordinance of the city, and a resolution of the Board and duly executed by the city and the Board; provided, that none of the waters or water rights, by this article placed under the control of said Board, shall be conveyed, leased or otherwise disposed of, except as provided in section 191 of this charter.

(n) That the Superintendent of Waterworks and the five members of the Board of Water Commissioners shall be officers of the municipality in addition to the other officers thereof provided for herein.

Sec. 193. All water mains hereafter laid in said city by any private person, company, or corporation shall be of such material and of such capacity as shall be prescribed by ordinance; provided, that no such main shall hereafter be laid in said city of less dimensions than four inches in diameter.

The rates of compensation for use of water to be collected in said city, by any person, company, or corporation, other than the Board of Water Commissioners, shall be fixed annually by ordinance, and shall continue in force for one year and no longer. Such ordinance shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Should the Council fail to pass the necessary ordinances, fixing the water rates within the time hereinbefore prescribed, it shall be subject to peremptory process to compel action at the suit of any party interested.

## ARTICLE XIX.

### ELECTIONS.

Sec. 194. Elections to be held in said city for the purpose of electing the officers of said city, and for all other purposes, are of two kinds:

(1) General Municipal Elections.

(2) Special Elections.

Section 195. General municipal elections shall be held in said city on the first Tuesday in December, 1906, on the first Tuesday in December, 1909, and on the first Tuesday in December every two years thereafter, at which shall be elected:

A mayor.
A city clerk.
A city attorney.
A city treasurer.
A city auditor,
A city tax and license collector,
A city assessor, and
Seven members of the board of education,
And by the electors of each ward:
One member of the city council.—[Amendment, 1905.]

Section 196. The officers elected at a general municipal election shall, after they have qualified as provided in this charter enter upon the discharge of the duties of the offices to which they have been elected, on the first Monday in January of the year succeeding their election, and, except in the case of the officers elected at the general municipal election to be held on the first Tuesday in December, 1906, shall serve for two years, and until their successors have been elected and qualified.

The officers elected at the general municipal election to be held on the first Tuesday in December, 1906, shall serve for three years and until their successors shall have been elected and qualified.

In the case of a special election to fill a vacancy, the person

elected shall, after qualifying, as herein provided, enter at once upon the discharge of the duties of the office to which he has been elected, and shall serve for the remainder of the term, and until his successor shall have been elected and qualified.—[Amendment, 1905.]

Sec. 197. In the event of a vacancy in the city council, a special election for the purpose of filling the same shall be ordered and held without delay. In the event of a vacancy in any other elective office the council shall fill such vacancy for the unexpired term.—[Amendment, 1905.]

Sec. 198. The Council shall have power to submit to the electors of said city at any election any question required to be so submitted by the Constitution, the law, this charter, or by ordinance; provided, that in case such question is required by said Constitution, law, charter, or ordinance to be submitted at a special or other particular kind of election, it shall be so submitted, and not otherwise.

## The Initiative.

Sec. 198a. Any proposed ordinance may be submitted to the Council by a petition signed by registered electors of the city equal in number to the percentages hereinafter required. The signatures to the petition need not all be appended to one paper, but each signer shall add to his signature, his place of residence, giving the street and number. One of the signers of each such paper shall make oath before an officer competent to administer oaths, that the statements therein made are true, and that each signature to the paper appended is the genuine signature of the person whose name purports to be thereunto subscribed. Within ten days from the date of filing such petition the City Clerk shall examine and from the great register ascertain whether or not said petition is signed by the requisite number of qualified electors, and if necessary, the Council shall allow him extra help for that purpose, and he shall attach to said petition his certificate showing the result of said examination. If, by the Clerk's cer-

tificate, the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. The Clerk shall, within ten days after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same without prejudice, however, to the filing of a new petition to the same effect. If the petition shall be found to be sufficient, the Clerk shall submit the same to the Council without delay.

If the petition accompanying the proposed ordinance be signed by electors equal in number to fifteen per cent. of the entire vote cast for all candidates for Mayor at the last preceding general election at which a Mayor was elected, and contains a request that said ordinance be submitted forthwith to a vote of the people at a special election, then the Council shall either:

(a) Pass said ordinance without alteration within twenty days after the attachment of the Clerk's certificate of sufficiency to the accompanying petition (subject to a referendary vote under the provisions of section 198b of this charter); and if the ordinance shall be passed by the Council, but shall be vetoed by the Mayor, and on reconsideration shall fail of passage by the Council, then, within five days after determination that said ordinance shall have so failed of final adoption, the Council shall proceed to call a special election at which said ordinance, without alteration, shall be submitted to a vote of the people; or,

(b) Forthwith after the Clerk shall attach to the petition accompanying such ordinance his certificate of sufficiency, the Council shall proceed to call a special election at which said ordinance, without alteration, shall be submitted to a vote of the people.

If the petition be signed by electors equal in number to at least five per cent. but less than fifteen per cent. of the entire vote cast for all candidates for Mayor at the last preceding general election at which a Mayor was elected, then such ordinance, without alteration, shall be submitted by the Council to a vote of the people at the next general municipal election that shall occur at

any time after thirty days from the date of the Clerk's certificate of sufficiency attached to the petition accompanying such ordinance.

The ballots used when voting upon said proposed ordinance shall contain the words "For the Ordinance" (stating the nature of the proposed ordinance) and "Against the Ordinance" (stating general nature of the proposed ordinance). If a majority of the qualified electors voting on said proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city; and any ordinance proposed by petition, or which shall be adopted by a vote of the people cannot be repealed or amended except by a vote of the people.

Any number of proposed ordinances may be voted upon at the same election, in accordance with the provisions of this section; provided that there shall not be held under this section of the charter, more than one special election in any period of six months.

The Council may submit a proposition for the repeal of any such ordinance, or for amendments thereto, to be voted upon at any succeeding general city election; and should such proposition, so submitted, receive a majority of the votes cast thereon at such election, such ordinance shall be repealed or amended accordingly. Whenever any ordinance or proposition is required by this charter to be submitted to the voters of the city at any election, the City Clerk shall cause the ordinance or proposition to be printed, and he shall enclose a printed copy thereof in an envelope with a sample ballot, and mail the same to each voter, at least ten days prior to the election, but the City Council may order such ordinance or proposition to be printed in the official newspaper of the city and published in like manner as ordinances adopted by the Council are required to be published, and may order that such publication shall take the place of the printing and mailing of the ordinance or proposition, and of the sample ballot as first above provided.—[Amendment, 1903.]

THE REFERENDUM.

Sec. 198b. No ordinance passed by the City Council (except when otherwise required by the general laws of the State or by the provisions of this charter, respecting street improvements, and except an ordinance for the immediate preservation of the public peace, health, or safety, which contains a statement of its urgency, and is passed by a two-thirds vote of the Council, but no grant of any franchise shall be construed to be an urgency measure, but all franchises shall be subject to the referendary vote herein provided), shall go into effect before thirty days from the time of its final passage and its approval by the Mayor; and if during said thirty days a petition signed by electors of the city equal in number to at least seven per cent. of the entire vote cast for all candidates for Mayor at the last preceding general election at which a Mayor was elected, protesting against the passage of such ordinance, be presented to the Council, the same shall thereupon be suspended from going into operation, and it shall be the duty of the Council to reconsider such ordinance, and if the same is not entirely repealed, the Council shall submit the ordinance as is provided in section 198a of this charter, to the vote of the electors of the city, either at the next general election or at a special municipal election to be called for that purpose, and such ordinance shall not go into effect or become operative unless a majority of the qualified electors voting on the same shall vote in favor thereof. Said petition shall be in all respects in accordance with the provisions of said section 198a, except as to the percentage of signers, and be examined and certified by the Clerk in all respects as is therein provided.

THE RECALL.

Sec. 198c. The holder of any elective office may be removed at any time by the electors qualified to vote for a successor of such incumbent. The procedure to effect the removal of an incumbent of an elective office shall be as follows: A petition signed by electors entitled to vote for a successor to the

incumbent sought to be removed, equal in number to at least 25 per centum of the entire vote for all candidates for the office, the incumbent of which is sought to be removed, cast at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed, shall be filed with the City Clerk; provided, that the petition sent to the Council shall contain a general statement of the grounds for which the removal is sought. The signatures to the petition need not all be appended to one paper, but each signer shall add to his signature his place of residence, giving the street and number. One of the signers of each such paper shall make oath before an officer competent to administer oaths, that the statements therein made are true, and that each signature to the paper appended is the genuine signature of the person whose name purports to be thereunto subscribed. Within ten days from the date of filing such petition the City Clerk shall examine and from the great register ascertain whether or not said petition is signed by the requisite number of qualified electors, and if necessary, the Council shall allow him extra help for that purpose, and he shall attach to said petition his certificate showing the result of said examination. If, by the Clerk's certificate, the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. The Clerk shall, within ten days after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same without prejudice, however, to the filing of a new petition to the same effect. If the petition shall be found to be sufficient the Clerk shall submit the same to the Council without delay. If the petition shall be found to be sufficient the City Council shall order, and fix a date for holding the said election, not less than thirty days nor more than forty days from the date of the Clerk's certificate to the Council that a sufficient petition is filed.

The City Council shall make or cause to be made publication of notice, and all arrangements for holding of such election; and the same shall be conducted, returned, and the result

thereof declared, in all respects, as are other city elections. The successor of any officer so removed shall hold office during the unexpired term of his predecessor. Any person sought to be removed may be a candidate to succeed himself, and, unless he requests otherwise, in writing, the Clerk shall place his name on the official ballot without nomination. In any such removal election, the candidate receiving the highest number of votes shall be declared elected. At such election if some other person than the incumbent receives the highest number of votes, the incumbent shall thereupon be deemed removed from the office upon qualification of his successor. In case the party who receives the highest number of votes should fail to qualify within ten days after receiving notification of election, the office shall be deemed vacant. If the incumbent receives the highest number of votes he shall continue in office.—[Amendment, 1903.]

Sec. 199. If any special election be ordered held and conducted, it shall be ordered, held and conducted (except as to the date thereof), and the result thereof made known and declared, in the same manner as herein provided for other elections.

Sec. 200. The Council of said city shall by ordinance order the holding of all elections. Such ordinances shall specify the object and time of, and place or places within the limits of each ward, for the holding of such election, and the names of the Inspector and Judges for each ward or precinct of each ward as the case may be, who must be residents thereof, to conduct the holding of and make returns of such election; provided that the Council may by said ordinance divide any of the wards into two or more precincts, specifying the boundary of each precinct and provide for the holding of an election in each of said precincts. Said ordinance shall be published in some daily newspaper printed and published in said city for at least ten days prior to the time appointed for the holding of the elections.

Sec. 201. Returns of all elections shall be made to the Council who shall, within ten days thereafter, either at a regular or special meeting, canvass the returns and declare the result

thereof, and order certificates of election to be issued by the City Clerk to the persons elected. The Council shall be the judge of the qualifications of all of the elective officers.

Sec. 202. All elections shall, in all other respects, be conducted and held in accordance with the provisions of the laws of the State for the holding of general elections in effect at the time.

Sec. 203. No person shall be eligible to any municipal office under this charter who at the time of his election or appointment is not a qualified elector of this city, and to be eligible to the office of member of the council, the person elected must also have been a resident of the ward from which he is elected for at last two years next preceding his election; and in case any member of the council shall remove from the ward which he represents, his office shall immediately become vacant, and shall be filled as directed in this charter; provided, however, that in case the boundaries of any ward are changed, no member of the council whose residence is thereby included within a different ward from that from which he was elected shall lose his office by reason of such change.—[Amendment, 1905.]

Sec. 204. The qualifications of an elector at any election held in pursuance of this charter shall be the same as those prescribed by the laws of this State for an elector at a general State election, in force at the time of such election; provided, that when any such municipal election is held after the completion of the register for any general State election, all persons who are on the last such register completed, and also all persons who have registered since the completion thereof, and before the closing of registration for such municipal election, shall be entitled to vote at such municipal election. Registration and transfers of registration for any such municipal election shall cease for the same period before the holding thereof as is or may be provided in the case of general State elections.

It shall be the duty of the County Clerk of the County of Los Angeles, to keep his office open for registration, for at least

sixty days prior to the closing of registration for such municipal election, and to register all qualified electors of said city, who may apply for such registration during that time.—[Amendment, 1905.]

Sec. 205. The registers used at any election held in pursuance of this charter shall be the registers used at the last preceding general State election in the precincts in which such municipal election is held, together with supplemental registers showing all additional registrations, transfers, and changes, since the closing of registration for such general State election. It shall be the duty of the County Clerk of the County of Los Angeles to furnish such registers with proper indices thereto, to the City Clerk of said city at least five days before the holding of such municipal election.—[Amendment, 1905.]

Sec. 206. The present officers of the city shall hold, continue to hold and exercise their respective offices until the election or appointment and qualification of the first officers to be elected or appointed under this charter, with the powers and duties vested in and imposed upon them by the charter and the ordinances of the city under which they were elected.

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## ARTICLE XX.

### CONTRACTS.

Sec. 207. The City of Los Angeles shall not be and is not bound by any contract (except such a contract as is now or may be hereafter authorized by this charter to be made in behalf of the city by a board or officer of the city), unless the City Council shall have first caused notice to be published in a daily newspaper, printed and published in the City of Los Angeles, inviting proposals to perform the same, and thereafter shall have let said contract to the lowest responsible bidder furnishing security for its performance, satisfactory to the City Council.

Provided, that any such contract shall be made in writing, the draft thereof approved by the City Council, and the same

ordered to be, and be signed on behalf of the city by the Mayor, or some other person authorized thereto by resolution; and provided, further, that the approval, as to form, of such contract by the City Attorney, as required by Section 49 of this charter, shall be endorsed on the draft thereof before the Council shall have power to approve the same; but the Council may by resolution authorize any officer, committee, or agent of the city to bind the city for the payment of a sum of money not exceeding $500.00, without a contract in writing and without any previous publication of notice inviting proposals.—[Amendment, 1905.]

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## ARTICLE XXI.

### CLAIMS AND DEMANDS.

Sec. 208. All claims and demands whatever against the City of Los Angeles except interest coupons on bonds and bonds of the funded debt, shall be paid only on demands as herein provided for.

Sec. 209. Said demands, except demands payable out of the School Fund, the Library Fund, Water Revenue Fund or funds derived from the sale of bonds issued by the City of Los Angeles, shall be presented to the Council on forms and blanks to be provided by the City Clerk, and shall be referred to its Committee on Finance. The said committee shall, by endorsement thereon, approve or reject the same in whole or in part. The Council shall then consider the said demands and the action of said committee thereon, and shall, if the same be just and legal, approve the same; or may, if it so determine, approve in part or reject the whole. The action of the Council shall be endorsed thereon, with the date of such action, and certified by the signature of the President and City Clerk; provided, that it shall require the votes of two-thirds of the members of the whole Council, under a call of the ayes and noes, and the vote spread upon the minutes, to approve any such demand in whole or in part.—[Amendment, 1907.]

Sec. 210. Any such demand approved by the Council, in whole or in part, shall be delivered to the Mayor, who shall approve the same in whole or in part, or reject the same and indorse such approval or rejection thereon, with the date thereof; provided, that the Mayor shall have no power to approve a demand for a sum larger than the sum in which it is approved by the Council. If the Mayor approve only in part, and for a less amount than approved by the Council, or reject any such demand, he shall return the same to the City Clerk with his objections in writing attached thereto.

Sec. 211. All demands approved by the Mayor for the same amount as approved by the Council, shall by him be delivered to the City Auditor, who shall satisfy himself whether the money is legally due and remains unpaid, and whether the payment thereof from the City Treasury is authorized by law, and out of what fund. If he approve it, he shall indorse upon it the word "approved," with the name of the fund out of which it is payable, with the date of such approval, and sign his name thereto; provided, that such approval by the City Auditor shall be valid only for such amount as shall have been approved by both the Council and the Mayor, unless the objections of the Mayor have been overruled by the Council, as provided in section 214, and if in the judgment of the City Auditor such demand should be allowed only for a less amount than approved by the Council and the Mayor, or he shall reject the said demand, he shall return the same to the Council with his objections in writing attached thereto.

Sec. 212. All demands payable out of the School Fund must, before they can be approved by the City Auditor, or paid, be previously approved by the Board of Education, by a vote of five members thereof taken with the ayes and noes and spread on the minutes, and the action of said board indorsed on said demand and signed by the presiding officer and the clerk thereof. After the approval of said demands they shall be delivered to the City Auditor, who shall have the same powers and shall

perform the same duties in reference to demands payable out of the School Fund as is provided for other demands; provided that in case the City Auditor shall reject any such demand, or if in his opinion said demand should be paid only in part, he shall return the same to the Board of Education, instead of the Council.—[Amendment, 1907.]

Sec. 213. All demands payable out of the library fund must, before they can be approved by the City Auditor, or paid, be previously approved by the Board of Directors of the Los Angeles Public Library, by a vote of three members thereof, taken with the ayes and noes and spread on the minutes, and the action of said board indorsed on said demand and signed by the presiding officer and the clerk thereof. After the approval of said demands they shall be delivered to the City Auditor, who shall have the same power and perform the same duties in reference to demands payable out of the library fund as are provided for other demands; provided that in case the City Auditor shall reject any such demand, or if in his opinion said demand should be paid only in part, he shall return the same to the said Board of Directors, instead of to the Council.

Sec. 213½. All demands payable out of the Water Revenue Fund must be presented to the Board of Water Commissioners, and, before they can be approved by the City Auditor or paid, must be previously approved by the Board of Water Commissioners, by a vote of three members thereof, taken with the ayes and noes spread upon the minutes, and the action of said board must be endorsed on said demand and signed by the President, and Secretary thereof, or in the absence of the President, by two members and the Secretary thereof. After the approval of said demands by the Board of Water Commissioners, they shall be delivered to the City Auditor, who shall have the same power and perform the same duties in reference to demands payable out of the Water Revenue Fund, as are prescribed for other demands; provided, that in case the City Auditor shall reject any such demand, or if, in his opinion, said demand should be paid

only in part, he shall return the same to the Board of Water Commissioners, instead of to the Council.—[Amendment, 1903.]

Sec. 213¾. All demands payable out of funds derived from the sale of bonds issued by the City of Los Angeles to pay the cost of constructing or completing any public work, improvement or building must be presented to the Board of Public Works, and, before they can be approved by the City Auditor or paid, must be previously approved by the Board of Public Works, by a vote of two members thereof, taken by the ayes and noes spread upon the minutes of the Board, and the action of said Board must be endorsed on said demand by the President and Secretary thereof, or in the absence of the President, by two members and the Secretary thereof. After the approval of said demands by the Board of Public Works, they shall be delivered to the City Auditor, who shall have the same power and perform the same duties in reference to demands payable out of funds derived from the sale of bonds, as are prescribed for other demands, provided, that in case the City Auditor shall reject any of such demands, or if, in his opinion, said demands should be paid only in part he shall return the same to the Board of Public Works, instead of to the Council.—[Amendment, 1907.]

Sec. 214. Any demand returned to the City Clerk, with the objections of either the Mayor or City Auditor, shall again be considered by the Council, and if it shall again be approved by the Council by the same vote taken and recorded and endorsed in the same manner as required by Section 209 hereof, the said objection shall be thereby overruled. Any demand returned to the Board of Education, the Board of Directors of the Los Angeles Public Library, the Board of Public Works, or the Board of Water Commissioners, with the objections of the Auditor shall again be considered by such Board, and if such demand be again approved as received in the first instance such objections of the said Auditor shall be thereby overruled. Any demand, the objections to which of the Mayor have been overruled, shall be delivered to the

City Auditor, who shall have the same power and perform the same duties in reference thereto as if the same had been approved by the Mayor. Any demand, the objection to which of the City Auditor has been overruled by the Council, the Board of Education, the Board of Directors of the Los Angeles Public Library, the Board of Public Works, or the Board of Water Commissioners, as the case may be, shall be delivered to the City Auditor, who shall number and make a record of such demand, as in the case of demands approved by him.—[Amendment, 1907.]

Sec. 215. No demand can be approved by any board or officer, audited or paid, unless it specify each several item, with the date and amount thereof.

Sec. 216. No payment can be made from the City Treasury, or out of the public funds of said city, unless the same be specially authorized by law or this charter, nor unless the demand which is paid be duly audited as in this charter provided. The term "audited", as used in this charter with reference to demands upon the treasury, is to be understood to mean that said demands have been presented to, passed upon and approved by every officer and board of officers, as required by this charter, or the objections of the Mayor or City Auditor, or both, as the case may be, have been overruled, as herein provided, and this must appear upon the face of the paper representing the demand, or else it is not audited; provided, that the approval or rejection in whole or part of a demand by the Committee on Finance of the Council is advisory only to the Council, and the rejection by said committee of a demand in whole or in part does not of itself prevent it being duly audited.

Sec. 217. No demand upon the treasury shall be allowed by the City Auditor in favor of any person or officer in any manner indebted thereto without first deducting the amount of such indebtedness, nor to any person or officer having the collection, custody of or disbursement of public funds, unless his account has been duly presented, passed, approved and allowed, as required by law or this charter; nor in favor of any officer who shall have

neglected to make his official returns or his reports in writing in the manner and at the time required by law or this charter, or by the ordinances or regulations made in pursuance thereof; nor to any officer who shall have neglected or refused to comply with any of the provisions of this charter or ordinances of the city, or any act of Legislature regulating the duties of such officer, on being required in writing to comply therewith by the Mayor or the President of the Council; nor in favor of any officer for the time he shall have absented himself, without lawful cause, from the duties of his office during the office hours prescribed by this charter or by ordinance, and the City Auditor may examine any officer receiving a salary from the treasury on oath touching such absence.

Sec. 218. The City Auditor must number and keep a record of all demands on the treasury approved by him, or his objections to which have been overruled, showing the number, date, amount and name of the original and present holder, on what account allowed, out of what fund payable, and by what officers or board it has been previously approved; and it shall be a misdemeanor in office for the City Auditor to deliver any demand with his approval thereon, or otherwise, until this requisite has been complied with.

Sec. 219. Every lawful demand upon the treasury, duly audited, as in this charter required, shall in all cases be paid on presentation and canceled, and the proper entry thereof be made, if there be sufficient money in the treasury belonging to the fund out of which it is payable; but if there be not sufficient money belonging to said fund to pay such demand, then it shall be registered in a book to be kept by the Treasurer for that purpose, showing its number, when presented, date, amount, name of the original holder, and on what account allowed, and out of what fund payable; and being so registered, shall be returned to the party presenting it, with an endorsement of the word "registered," dated and signed by the City Treasurer. All

registered demands shall be payable in the order of their registration.

Sec. 220. Nothing in this article contained shall be construed as interfering with or preventing the payment by the City Treasurer of bonds of the funded debt of the City of Los Angeles, and the interest coupons thereof, in accordance with the Constitution, laws and ordinances authorizing the issuance of said bonds.

Sec. 221 All public moneys collected by any officer or employee of the city shall be paid into the City Treasury, without any deduction on account of any claim for fees, commissions or any other cause or pretense; and the compensation of any officer, employee or other person so collecting money, shall be paid by demands on the Treasury duly audited as other demands are audited, and paid.

Sec. 222. No suit shall be brought on any claim for money or damages against the City of Los Angeles, its Board of Education, Board of Directors of the Los Angeles Public Library, Board of Public Works, or the Board of Water Commissioners, until a demand for the same has been presented, as herein provided, and rejected in whole or in part. If rejected in part, suit may be brought to recover the whole. Nor shall suit be brought against said city, or said Board of Education, Board of Directors of the Los Angeles Public Library, Board of Public Works, or Board of Water Commissioners, upon any claim or demand that has been in whole approved and audited as provided herein; provided that nothing herein contained shall be construed so as to deprive the holder of any demand of his right to resort to a writ of mandamus or other proceedings against the City Council, or any board or officer of said city, to compel it or him to act upon such claim or demand, or to pay the same when so audited.—[Amendment, 1907.]

## ARTICLE XXII.

### MISCELLANEOUS PROVISIONS.

Sec. 223. The indebtedness of said city must not exceed

the sum of $5,000,000, exclusive of any indebtedness that has been or may hereafter be incurred for the purpose of acquiring or establishing a system of waterworks for supplying the inhabitants of the city with water, and of any indebtedness that has been or may hereafter be incurred for the purpose of constructing sewers, for the collection and disposition of the sewage of the city, and of any indebtedness that has been or may hereafter be incurred for the purpose of constructing sewers for the collection and disposition of storm waters in the city. For any or all of these purposes a further indebtedness may be incurred by the issue of bonds under the provisions and subject only to the limitations of the Constitution and general laws.—[Amendment, 1903.]

Sec. 224. In any action, suit or proceedings in any court concerning an assessment of property, or levy of taxes, authorized by this Act, or the collection of any such, or in the proceedings consequent thereon, such assessment, levy, consequent proceeding, and all proceedings connected therewith, shall be presumed to be regularly and duly done or taken until the contrary is shown; and when any proceeding, matter or thing is by this Act committed, or left to the discretion of the Mayor and Council, or the Council, or other authorities of said city, such discretion or judgment, when expressed or declared, is final, and cannot be reveiwed or called in question elsewhere.

Sec. 225. Real property when sold for, or to satisfy a delinquent assessment or tax, must be sold for United States coin, and not otherwise; and any one applying or seeking to redeem property so sold, as in this charter provided, must pay, or offer to pay, the sum necessary therefor in such coin, and not otherwise.

Sec. 226. In all prosecutions for violation of any city ordinance, rule or other regulation of said authorities, whether in the court of original jurisdiction or in any appellate court, it shall be unnecessary to plead the contents of the same; but the court before which the prosecution shall be pending shall take judicial

notice of such ordinance, resolution, rule or other regulation, and of the contents thereof; and, in any civil action or proceeding to which the said corporation is a party, either as plaintiff or defendant, the adoption and contents of any ordinance, resolution, by-law, rule, or regulation may be prima facie proven by the introduction of the original entry thereof on the journal of the proceedings of the Council, a copy of such entry, certified by the City Clerk to be a full, true and correct copy of such original entry, or by the introduction of a printed copy thereof.

Sec. 227. All acts of the Legislature relating to the City of Los Angeles, and all city ordinances, resolutions and other regulations now in force and not inconsistent herewith, shall be and remain in force after this charter takes effect until changed or repealed by the proper authority; and all rights vested under any former act or regulation, when this takes effect, shall thereby be lost, impaired or discharged; and all actions and proceedings commenced in any court wherein the City of Los Angeles is a party, shall be continued under the law existing when said action or proceedings was commenced; provided that whenever, in any ordinance or resolution hereby continued in force, there shall be imposed duties on, or powers given to the Clerk of the Council, such duties shall be performed by and such powers be exercised by the City Clerk.

Sec. 228. This charter shall take effect immediately on its approval by the Legislature, as provided by law.

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## ARTICLE XXIII.

[Amendment, 1903.]

Sec. 229. Immediately upon the adoption of this Article, the Mayor shall appoint, subject to confirmation by the Council, five persons known by him to be devoted to the principles of civil service reform, who shall constitute and be known as the Board of Civil Service Commissioners.

They shall serve for the term of four years and without compensation. They shall so classify themselves by lot, that one

of them shall go out of office at the end of one year; one at the end of two years; one at the end of three years; and two at the end of four years. Three Commissioners shall constitute a quorum. All appointments to said Commission both original and to fill vacancies, shall be made by the Mayor, subject to confirmation by the Council, and shall be so made that not more than three members shall at the same time be members of the same political party. Said Commissioners shall hold no other office or public employment.

Sec. 230. The Mayor, with the consent of the Council, may remove any Commissioner for incompetency, neglect of duty or malfeasance in office.

Sec. 231. Said commission shall classify all the offices and places of employment mentioned in section 239 of this Article with reference to the examination herein provided for. The offices and places so classified by the Commission shall constitute the classified civil service of said city; and no appointment to any such offices or places shall be made except under and according to the rules hereinafter mentioned.

Sec. 232. Said Commission shall make rules to carry out the purposes of this Article and for the examinations and appointments in accordance with its provisions, and the Commission may, from time to time, make changes in such rules.

Sec. 233. All rules made as hereinbefore provided, and all changes therein, shall be printed for distribution by said Commission. The Commission shall give notice by publication in the official paper of the place or places where said rules may be obtained, and in such publication shall be specified the date, not less than thirty days subsequent to the date of such publication, when said rules shall go into operation.

Sec. 234. All applicants for office, places, or employments in said classified civil service, shall be subject to examination, which shall be public, competitive and free to all citizens of the United States, with specified limitations as to residence, age, sex, health, habits, and moral character. Such examinations shall be

practical in their character, and shall relate to those matters which will fairly test the relative capacity of the persons examined to discharge the duties of the position to which they seek to be appointed, and, when appropriate, shall include, or exclusively consist of, tests of physical qualifications, health, and manual skill. No question in any examination shall relate to political or religious opinions or affiliations. The Commission shall control all examinations, and may, whenever an examination is to take place, obtain the assistance of a suitable person or number of persons to aid it in preparing for and conducting such examinations.—[Amendment, 1905.]

Sec. 235. Notice of time, place, and general scope of every examination shall be given by the Commission by publication for two weeks preceding such examination in the official paper, and such notice shall also be posted by said commission in a conspicuous place at the City Hall, and in its office, two weeks before such examination. Such further notice of examination shall be given as it may prescribe. Provided, that, for registration in the class of unskilled laborers medical or physical examinations may be made or held from day to day as applicants present themselves, and without previous notice.—[Amendment, 1905.]

Sec. 236. From the examinations made by the Commission it shall prepare a register, in each grade or class of position, in the classified civil service, other than that of unskilled laborers employed by the day, of the persons whose general average standing upon examination for such grade or class is not less than the minimum fixed by the rules of said commission, and who are otherwise eligible, and such persons shall take rank upon the register as candidates in order of their relative excellence, as determined by their examination without reference to priority of the date of examination.

The Commission shall also keep a register upon which shall be entered, in the order of their application, the names of all who apply for employment in the class of unskilled laborers, and

who, after such medical or physical examination as the board may prescribe, are found to be capable of performing in a satisfactory manner the duties of the occupation sought. In case any registered applicant in said class of unskilled laborers shall be employed, and subsequently laid off or dismissed through lack of work, or through no fault of his own, that fact shall be forthwith certified to the Board of Civil Service Commissioners by the head of the department in which such laborer was employed, and he shall be restored to his original place upon the register.—[Amendment, 1905.]

Sec. 237. The Commission shall by its rules provide for the promotion in such classified civil service on the basis of ascertained merit and seniority in service and examination, and shall provide in all cases where it is practicable that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination; and it shall be the duty of the Commission to submit to the appointing power the names of not more than three applicants for each promotion having the highest rating; but in fixing said rating a uniform allowance of credits, to be stated at the time of the announcement of said examination, shall be made for each year of past service. The method of examination and the rules governing the same, and the method of certifying, shall be the same as provided for applicants for original appointment.

Sec. 237½. Any civil service employe who is injured in the service of the city while actually engaged in the discharge of the duties of his position may, in the discretion of the Board of Civil Service Commissioners, be assigned to a position other than that for which he has been examined, and with or without examination. Said Commissioners, upon assigning such person so injured to such new position, shall place his name at the head of the eligible list, and he shall thereafter be first certified for such position. The Board of Civil Service Commissioners shall not place such person so injured as aforesaid at the head of any

eligible list without carefully examining the facts of each case, and making its finding that such person is not incompetent, by reason of physical or other disability, to fill the same. Nothing in this provision shall be construed as compelling said Commission to take the action herein provided for unless the person injured is, in the judgment of said Commission, of good moral character and worthy of receiving the benefits hereof.

Sec. 238. The head of a department in which position in the class of unskilled laborers employed by the day is to be filled shall notify said commission of that fact, and said commission shall thereupon certify to such officer or board the name and address of the applicant standing first in order on the register of unskilled laborers, and the applicant thus certified shall thereupon be employed by such officer or board.

The head of a department in which a position, classified under this article, except a position in the class of unskilled laborers, is to be filled, shall notify said Commission of that fact, and said Commission shall certify to such officer the name and address of one or more candidates, not exceeding three, standing highest on the register for the class or grade to which said position belongs. In making such certification, sex shall be disregarded, except when some statute, the rules of said Commission, or the appointing power specify sex, said appointing officer or department shall notify said Commission of each position to be filled separately, and shall fill such place from the names certified to him or it by said Commission therefor. The candidate thus appointed shall be employed on probation for a period to be fixed by said rules, not exceeding six months. Each candidate, unless he shall be sooner appointed, or otherwise lawfully cease to be a candidate, shall be certified for appointment in the grade or class for which he is eligible not less than three times, and no candidate shall lose his place on the register by certification or rejection, except that said Commission may strike off names of candidates from the register after they have remained thereon more than two years. At or before the expiration of the period

of probation, the head of the department or office in which the candidate is employed, may discharge him upon assigning in writing the reasons therefor to said commission. If he is not thus discharged during the period of probation, his appointment shall be deemed complete. To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department, or any officer or board may, under such regulations as the Commission may by its rules prescribe, make temporary appointments in the classified civil service, to remain in force not exceeding sixty days, and only until regular appointment, under the provisions of this Article, can be made.—[Amendment, 1905.]

Sec. 239. The provisions of this Article shall apply to the following departments of the city, to wit:

The Department of the City Clerk,
The Department of Electricity,
The Fire Department,
The Treasurer's Department,
The Tax Collector's Department,
The Police Department,
The Auditor's Department,
The Assessor's Department,
The Health Department,
The Department of Building,
The Department of Public Works,
The Waterworks Department,
The Public Library,
The Park Department,
The City Engineer's Department,
The Street Department,
All Departments of Public Utilities,
All other employees of the city;

Provided, that the following shall be exempt therefrom, to wit:

All officers elected by the people,

All members of the different boards and commissions,
The Mayor's Clerk,
The Chief of Police and his Secretary,
The Chief Deputy of the Treasurer,
The City Engineer and his Chief Deputy,
The Chief Deputy and Cashier of the Tax Collector;
The Chief Deputy of the Auditor,
The City Superintendent of Schools and his deputies and teachers,
The assistants and stenographers of the City Attorney,
The City Prosecutor and the Assistant City Prosecutors,
The Librarian,
The Superintendent of Parks,
The Secretary of the Park Commission,
The Secretary of the Police Commission,
The Superintendent of Buildings,
The Humane Officer,
The Chief Engineer of the Fire Department,
The Superintendent, Water Overseer, Auditor and Cashier of the Waterworks Department.
All physicians appointed on or by the Board of Health.
All officers of election,
The Police Surgeons;

And any of the following persons may be exempted from the provisions of this Article, upon the request of the head of the department in which they are employed, by order of the Board of Civil Service Commission, approved by the Council by resolution passed by the vote of two-thirds (2-3) of all its members, to wit: (a) The first and second deputies in any department or either of such deputies where not exempt, as above provided. (b) Unskilled laborers, including drivers. (c) Persons employed on the construction of public works, improvements or buildings. (d) Persons employed to render professional, scientific, technical or expert services of an occasional and exceptional character. Any exemption thus made may be

terminated at any time by resolution of the Board of Civil Service Commissioners.—[Amendment, 1907.]

Sec. 240. The members of the police force shall be subject to removal and discharge as provided elsewhere in this charter.

Sec. 241. The members of the Fire force shall be subject to removal and discharge as provided elsewhere in this charter.

Sec. 242. No officer or employee in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed or discharged except for cause upon written charges, and after an opportunity to be heard in his own defense. Such charges shall be publicly investigated by the Board of Police Commissioners in the case of an officer or employee in the Police Department; by the Board of Fire Commissioners in the case of an officer or employee in the Fire Department; and by the Board of Civil Service Commissioners in all other cases. If the board conducting such investigation shall find that sufficient cause is shown therefor, it shall order that such officer or employee be removed or discharged, such finding and decision shall be final, and except in the case of an officer or employee in the Police or Fire Department, shall be certified to and be forthwith enforced by the appointing board or officer.

Nothing in this Article shall limit the power of any appointing board or officer to suspend a subordinate for a reasonable period, not exceding thirty days.—[Amendment, 1905.]

Sec. 243. Immediate notice in writing shall be given by the appointing powers, to said Commission, of all appointments, permanent or temporary, made in such classified civil service, and of all transfers, promotions, resignations, or vacancies from any cause in such service, and of the date thereof, and a record of the same shall be kept by said Commission. When any office or place of employment is created or abolished, or the compensation attached thereto altered, the officer or board making such change shall immediately report in writing to said Commission.

Sec. 244. The Commission shall investigate the enforcement

of this Article and its rules, and the conduct and action of the appointees in the classified civil service in this city.

Sec. 245. Said Commission shall make an annual report to the Mayor for transmission to the Council. The Mayor may require a special report from said Commission at any time.

Sec. 246. Said Commission shall appoint a secretary whose duty it shall be to keep minutes of its proceedings and a record of all examinations held under its direction, and perform such other duties as the Commission may prescribe.

Sec. 247. All officers of said city shall aid the Commission in all proper ways in carrying out the provisions of this Article.

Sec. 248. The Council shall furnish said Commissioners with suitable offices and shall provide furniture, books, stationery, blanks, heat and light, and is authorized and required to pay such other expenses as may be necessarily incurred by said Commissioners in carrying out the provisions of this Article.

Sec. 249. No officer or other person shall wilfully or corruptly, by himself or in co-operation with one or more other persons, defeat, deceive, or obstruct any person in respect to his or her right of examination, or corruptly or falsely mark, grade, estimate, or report upon the examination or proper standing of any person examined hereunder, or aid in so doing, or wilfully or corruptly furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined or to be examined, of being employed, appointed, or promoted.

Sec. 250. No applicant for appointment in said classified civil service, either directly or indirectly, shall pay or promise to pay any money or other valuable thing to any person whatever for or on account of his appontment, or proposed appointment, and no other officer or employee shall pay, or promise to pay, either directly or indirectly, any money or other valuable thing whatever, for or on account of his promotion.

Sec. 251. The Commission shall certify to the Auditor all appointments to offices or places in the classified civil service, or

vacancies occurring therein whether by dismissal, resignation, or death, and all findings that a person shall be discharged from the classified civil service.

Sec. 252. The Auditor shall not, nor shall any auditing or accounting officer of the city, approve any demand for the salary or wages of any person subject to the provisions of this Article, for services as an officer or employee of such city, before the appointment of such person to the classified civil service has been certified, nor after the Commission shall have certified to the Auditor a finding made or approved by it under the provisions of this Article, that such person be discharged from the classified civil service.

Sec. 253. All officers and employees, who, at the time of taking effect of this Article, would be included in the classified civil service, and who shall have been continuously in the service of the city for a period of six months prior to the adoption of this Article, shall be deemed to have the necessary qualifications required by the provisions hereof, and shall retain their respective positions until removed for cause, as provided herein. All officers and employees, who, at the time of the taking effect of this Article, would be included in the classified civil service, but who have been in the service of the city for a period of less than six months, shall, during the period of six months from and after the taking effect of this Article, be deemed to be serving under probation and be subject to the same regulations as other candidates serving under probation, as hereinbefore provided in this Article.

Sec. 254. The City Council of the City of Los Angeles shall have power to pass ordinances imposing suitable penalties for the punishment of persons violating any of the provisions of this Article.

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## ARTICLE XXIV.

Sec. 255. Whenever it shall be provided by law that any of the duties now performed or hereafter to be performed by any

officer or officers of the City of Los Angeles may be performed by any officer or officers of the County of Los Angeles, the City of Los Angeles, may, by ordinance ratified by vote of the qualified electors of the city as hereinafter prescribed, provide that the duties of such city officer or officers, or any of such duties as are now permitted by law to be performed by such county officer or officers, may be performed by such county officer or officers of the County of Los Angeles, at the times and in the manner, and to the extent provided for by law. In case by such ordinance all the duties of an officer of the city are devolved upon an officer of the county, then upon the taking effect of such ordinance such city office shall cease to exist while such ordinance remains in force, but shall be revived by the repeal of such ordinance; and if by such ordinance only a part of the duties of an office are so devolved, then the remaining duties thereof shall be performed by such officer as may be designated for that purpose by such ordinance, and the office shall cease to exist while such ordinance remains in effect, but shall be revived by the repeal of such ordinance. As to all duties so performed by any county officer, he shall be ex-officia an officer of the City of Los Angeles. All provisions of this charter in conflict herewith, or with the provisions of such law, or with such ordinance, shall be suspended during the time that such ordinance remains in force and effect. —[Amendment, 1905.]

Sec. 256. No ordinance passed pursuant to the last preceding section shall take effect until it shall have been submitted for ratification by the voters of the city at a general municipal or special election, and ratified by a majority of all votes cast on the question of such ratification. No such ordinance shall be repealed or amended until the repealing or amending ordinance shall have been submitted for ratification by the voters of such city at a general municipal or special election, and ratified by a majority of all votes cast on the question of such ratification.—[Amendment, 1905.]

# Appendix I

## SENATE JOINT RESOLUTION NO. 2.

Passed the Senate, January 23d, A. D. 1889.

GEO. W. PECKHAM,
*Secretary of the Senate.*

Passed the Assembly, January 23d, A. D. 1889.

ED. E. LEAKE,
*Clerk of the Assembly.*

This bill was received by the Governor this 31st day of January, A. D. 1889.

M. D. BORUCK,
*Private Secretary of the Governor.*

## SENATE JOINT RESOLUTION NO. 2.

JOINT RESOLUTION APPROVING THE CHARTER OF THE CITY OF LOS ANGELES, IN LOS ANGELES COUNTY, CALIFORNIA, VOTED FOR AND RATIFIED BY THE QUALIFIED ELECTORS OF SAID CITY, AT A SPECIAL ELECTION HELD THEREIN FOR THAT PURPOSE, ON THE TWENTIETH DAY OF OCTOBER, 1888.

Whereas, The City of Los Angeles, in Los Angeles County, California, is now, and at all times herein referred to was a city containing a population of more than ten thousand, and not more than one hundred thousand inhabitants; and,

Whereas, At a special election duly held therein on the thirty-first day of May, one thousand eight hundred and eighty-eight, according to law, and to the provisions of Section eight, of Article eleven, of the Constitution of this State, a board of fifteen freeholders, duly qualified, was duly elected in and by said city and by the qualified electors thereof, to prepare and propose a charter for said city, which Board of Freeholders did, within

ninety days after said election, prepare and propose a charter for said city; and,

Whereas, The same was, on the twenty-third day of August, one thousand eight hundred and eighty-eight, signed in duplicate by a majority of the members of said Board of Freeholders, and was on the twenty-third day of August, one thousand eight hundred and eighty-eight, returned and delivered, one copy thereof to the Mayor of said City of Los Angeles, and the other copy thereof to the Recorder of Deeds of the County of Los Angeles (within which said city is situated); and,

Whereas, Such proposed charter was then published in two daily newspapers of general circulation in said city, to wit: In the Los Angeles Evening Express, and in the Los Angeles Daily Tribune, in each instance for more than twenty days, such publication having in each instance been commenced within twenty days after the completion of said proposed charter; and,

Whereas, Said charter was submitted within not less than thirty days after the completion of said publication by the legislative authority of said city, to wit: By the Council thereof to the qualified electors of said city, at a special election, previously duly called and thereafter held therein, on the twentieth day of October, one thousand eight hundred and eighty-eight; and,

Whereas, The returns of said election were duly canvassed by the Council of the City of Los Angeles, at its meeting held October twenty-second, one thousand eight hundred and eighty-eight, and said Council found as the result of said canvass, and did duly declare that there were cast at said election, four thousand five hundred and thirty-two votes of which number two thousand six hundred and forty-two votes were cast in favor of said charter, and one thousand eight hundred and ninety votes against the same, and that the majority in favor of the charter was seven hundred and fifty-two votes; and said Council did thereupon declare that said charter had been duly ratified by a majority of the qualified electors voting at said election; and

Whereas, At said election a majority of such qualified elec-

tors of said city, voting thereat, did vote in favor of and did ratify said charter so proposed; and,

Whereas, Said charter, as so ratified, is now submitted to the Legislature of the State of California for its approval or rejection as a whole, in accordance with the provisions of Section eight of Article eleven, of the Constitution of said State; and,

Whereas, The said charter so ratified is in the words and figures following, to wit:

## CHARTER OF THE CITY OF LOS ANGELES.

* * * * * * * * * * * * *

[Here follows text of the Charter ratified October 20, 1888, and approved January 23, 1889.]

## CERTIFICATE.

We, the undersigned members of the Board of Freeholders of the City of Los Angeles, elected at a special election held on the 31st day of May, 1888, have prepared and do hereby propose as a charter for said city the foregoing, consisting of twenty-two articles and two hundred and twenty-eight sections.

Done in duplicate at the City of Los Angeles, this 23d dav of August, A. D. 1888.

W. H. WORKMAN,
JOHN MANSFIELD,
W. W. ROBINSON,
A. F. MACKAY,
JOSE G. ESTUDILLO,
JERRY BALDWIN,
P. M. SCOTT,
CHARLES E. DAY,
J. H. BOOK,
THOS. B. BROWN,
I. R. DUNKELBERGER,
DR. JOSEPH KURTZ,
GEO. H. BONEBRAKE,
WALTER S. MOORE, *Secretary*.

Now, therefore, be it

Resolved, by the Senate of the State of California, the Assembly thereof concurring, (a majority of all the members-elect of each House voting for and concurring herein), that said charter be, and the same is hereby approved as a whole for and as the charter of said City of Los Angeles.

STEPHEN M. WHITE,
*President pro tem. of the Senate.*

Attest:
W. C. HENDRICKS,
*Secretary of State.*

ROBERT HOWE,
*Speaker of the Assembly.*

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STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES—SS.

I, John Bryson, Sr., Mayor of the City of Los Angeles, do hereby certify that in accordance with the terms and provisions of Section 8, Article XI, of the Constitution of the State of California, the Council of the City of Los Angeles duly passed a resolution providing for the holding of a special election on the 31st day of May, A. D. 1888, for the purpose of electing fifteen freeholders to prepare and propose a charter for the City of Los Angeles; that due notice of said election was given in the manner provided by law; that on said 31st day of May, A. D. 1888, said election was held, and the ballots cast thereat were duly canvassed by the Council of the City of Los Angeles, and the following named persons were declared duly elected to pre pare and propose a charter for the City of Los Angeles, to wit: W. H. Workman, John Mansfield, C. E. Thom, P. M. Scott, J. H. Book, Jerry Baldwin, Jose G. Estudillo, I. R. Dunkelberger, Chas. E. Day, Thos. B. Brown, W. W. Robinson, Dr. Jos. Kurtz, A. F. Mackay, Geo. H. Bonebrake, Walter S. Moore; that, thereafter, to wit: On the 23d day of August, A. D., 1888, said Board

of Freeholders duly returned a proposed charter for the City of Los Angeles, signed in duplicate by the entire board, one copy thereof to the Mayor of said city, and the other to the Recorder of Deeds of the County of Los Angeles; that thereafter such proposed charter was duly published in two daily papers of general circulation in said city, to wit: In the Los Angeles Evening Express and the Los Angeles Daily Tribune, for a period of twenty days (Sundays excepted), said publication, in each instance, commencing within twenty days after the completion of said charter; that thereafter and within thirty days after the completion of said publication, to wit: On the 20th day of October, A. D. 1888, at a special election duly called by the Council of the City of Los Angeles, the said proposed charter was submitted to the qualified electors of the City of Los Angeles, and the returns of said election were duly canvassed by the Council of the City of Los Angeles at its meeting held October 22d, 1888, and the result of said election was found to be as follows: In favor of said charter, 2,642 votes; against said charter, 1,890 votes; majority in favor of said charter, 752 votes; whereupon the said charter was declared duly ratified by a majority of the qualified electors voting at said election. And I further certify that the "Charter of the City of Los Angeles," embodied in the foregoing resolution, is a full and true copy of the charter proposed, voted upon and ratified as aforesaid.

In Testimony Whereof I have hereunto set my hand and affixed the corporate seal of said city, at my office, this 6th day of February, A. D. 1889.

JOHN BRYSON, SR.,
*Mayor of the City of Los Angeles.*

Attest:

M. F. STILES,
*Clerk of the Council of the City of Los Angeles.*
(Seal)

# Appendix II

## SENATE CONCURRENT RESOLUTION NO. 4.

Adopted in Senate, January 22, A. D. 1903.

F. J. BRANDON,
*Secretary of the Senate.*

Adopted in Assembly, January 23, A. D. 1903.

CLIO LLOYD,
*Chief Clerk of the Assembly.*

This resolution was received by the Governor, this 30th day of January, A. D. 1903.

A. B. NYE,
*Private Secretary of the Governor.*

## CHAPTER VI.

SENATE CONCURRENT RESOLUTION, NO. 4, APPROVING THIRTEEN CERTAIN AMENDMENTS TO THE CHARTER OF THE CITY OF LOS ANGELES, IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, VOTED FOR AND RATIFIED BY THE QUALIFIED ELECTORS OF THE SAID CITY OF LOS ANGELES AT THE GENERAL MUNICIPAL ELECTION HELD THEREIN FOR THAT PURPOSE ON THE FIRST DAY OF DECEMBER, 1902.

Whereas, The City of Los Angeles, in the County of Los Angeles, State of California, contains a population of over one hundred thousand inhabitants, and has been ever since the year eighteen hundred and eighty-nine, and is now, organized and acting under a freeholders' charter, adopted under and by virtue of Section eight, of Article eleven, of the Constitution of the State of California, which charter was duly ratified by a majority of the qualified electors of said city at a special election held for that purpose on the twentieth day of October, eighteen hundred and eighty-eight, and approved by the Legislature of the State of California, on the thirty-first day of January, eighteen hundred

and eighty-nine (Statutes of 1889, page 455), which charter has never been amended; and

Whereas, The City Council of said City of Los Angeles did, by ordinance No. 7540 (new series), adopted by said Council on the twenty-ninth day of September, nineteen hundred and two, and approved by the Mayor of said city on the thirtieth day of September, nineteen hundred and two, and pursuant to Section eight of Article eleven of the Constitution of the State of California, duly propose to the qualified electors of said City of Los Angeles, certain amendments to the charter of said city to be submitted to said qualified electors at a general municipal election to be held in said city on the first day of December, nineteen hundred and two, which said amendments were and are in words and figures as follows, to wit:

* * * * * * * * * * * *

[Here follows text of the amendments to the Charter ratified December 1, 1902, and approved January 23, 1903.]

And Whereas, Said proposed amendments were, and each of them was, published for twenty days in a daily newspaper printed and published in said city, and of general circulation therein, to wit: in "The Los Angeles Daily Journal," said publication ending on the 20th day of October, 1902; and,

Whereas, Thereafter the City Council of said city did, by an ordinance known as Ordinance No. 7685 (new series), which was duly adopted on the 17th day of November, 1902, order the holding of a general municipal election in said City of Los Angeles, on the 1st day of December, 1902, (at least forty days after the publication of said proposed amendments for twenty days in said daily newspaper of general circulation in said City of Los Angeles, to wit: "The Los Angeles Daily Journal"), and did provide in said ordinance for the submission of said proposed amendments to the said charter to the qualified electors of said city for their ratification at said general municipal election; which said ordinance was approved by the Mayor of said city on the 17th day of November, 1902, and was published for at least ten

days prior to the time appointed for the holding of said election, in "The Los Angeles Daily Journal," a daily newspaper printed and published in said city; and,

Whereas, At said election more than three-fifths of the qualified electors voting thereat voted in favor of the ratification of, and did ratify each and all of said proposed amendments to said charter; and,

Whereas, The City Council of said City of Los Angeles, at a special meeting thereof, held within ten days after said election, duly canvassed the returns of said election, and duly found, determined, and declared that more than three-fifths of such qualified electors voting at such election had voted for and ratified each and all of the said proposed amendments to said charter; and,

Whereas, The said proposed amendments so ratified have been duly presented and submitted to the Legislature of the State of California for approval or rejection without power of alteration or amendment, in accordance with Section eight of Article eleven of the Constitution of the State of California;

Now, therefore, be it

Resolved, By the Senate of the State of California, the Assembly thereof concurring (a majority of all members elected to each House voting for the adoption of this resolution and concurring herein), that the said amendments to the said charter of said City of Los Angeles, hereinbefore set forth, as presented and submitted to and adopted and ratified by the qualified electors of said city, be and the same are hereby approved as a whole for, and as amendments to, the said charter of said City of Los Angeles.

THOS. FLINT, JR.,
*President pro tem. of the Senate.*

Attest:
C. F. CURRY,
*Secretary of State.*

ARTHUR G. FISK,
*Speaker of the Assembly.*

Endorsed: Filed in the office of the Secretary of State, the 30th day of January, A. D. 1903.

C. F. CURRY,
*Secretary of State.*

By J. HOESCH, *Deputy.*

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES—ss.

I, M. P. Snyder, Mayor and chief executive officer of the City of Los Angeles, in the County and State aforesaid, do hereby certify that the copy of the amendments to the Charter of the City of Los Angeles, embodied and contained in the foregoing resolution, is a full, true and correct copy of the proposed amendments to the Charter of the City of Los Angeles, which were, in the manner prescribed by law, submitted to the qualified electors of said city, for their ratification, at a general municipal election, duly called and held in said city on the first day of December, 1902; that at said election more than three-fifths of the qualified electors voting thereat voted in favor of the ratification of, and did ratify, each and all of said proposed amendments to said Charter; and that the City Council of said City of Los Angeles, at a special meeting thereof, held within ten days after said election, duly canvassed the returns of said election, and duly found, determined, and declared that more than three-fifths of such qualified electors voting at such election had voted for and ratified each and all of the said proposed amendments to said Charter.

In Testimony Whereof, I have hereunto set my hand, and caused the corporate seal of said city to be affixed at my office in the City of Los Angeles, this 26th day of February, 1903.

M. P. SNYDER,
*Mayor and Chief Executive Officer of the City of Los Angeles.*

Attest:

H. J. LELANDE,
*City Clerk of the City of Los Angeles.*

(Seal)

Recorded in the office of the Recorder of Los Angeles County, March 26th, 1903, in Book 93, page 81, of Miscellaneous Records.

# Appendix III

## ASSEMBLY CONCURRENT RESOLUTION NO. 9.

Adopted in Assembly, February 6, A. D. 1905.

CLIO LLOYD,
*Chief Clerk of the Assembly*

Adopted in Senate, February 7, A. D. 1905.

LEWIS C. HILBORN,
*Secretary of the Senate.*

This resolution was received by the Governor, this 16th day of February, A. D. 1905.

A. B. NYE,
*Private Secretary of the Governor.*

## CHAPTER XVIII.

ASSEMBLY CONCURRENT RESOLUTION No 9, APPROVING SIX CERTAIN AMENDMENTS TO THE CHARTER OF LOS ANGELES IN THE COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, VOTED FOR AND RATIFIED BY THE QUALIFIED ELECTORS OF SAID CITY OF LOS ANGELES AT THE GENERAL MUNICIPAL ELECTION HELD THEREIN FOR THAT PURPOSE ON THE 5TH DAY OF DECEMBER, 1904.

Whereas, The City of Los Angeles, in the County of Los Angeles, State of California, contains a population of over one hundred thousand inhabitants, and has been ever since the year 1889, and is now, organized and acting under a freeholders' charter, adopted under and by virtue of Section eight, of Article eleven, of the Constitution of the State of California, which charter was duly ratified by a majority of the qualified electors of said city at a special election held for that purpose on the 20th day of

October, 1888, and approved by the Legislature of the State of California, on the 31st day of January, 1889, (Statutes of 1889, page 455); and,

Whereas, The City Council of said City of Los Angeles, did by Ordinance No. 9949 (new series) adopted by said Council on the 3rd day of October, 1904, and approved by the Mayor of said city on the 3rd day of October, 1904, and pursuant to Section 8, of Article eleven of the Constitution of the State of California, duly propose to the qualified electors of said City of Los Angeles certain amendments to the charter of said city, to be submitted to said qualified electors at a general municipal election to be held in said city on the 5th day of December, 1904, which said amendments were and are in the words and figures as follows, to wit:

* * * * * * * * * * * *

[Here follows text of the amendments to the Charter ratified December 5, 1904, and approved February 7, 1905.]

And Whereas, Said proposed amendments were, and each of them was, published for twenty days in a daily newspaper, printed and published in said city, and of general circulation therein, to wit: The "Los Angeles Daily Times," said publication ending on the 23rd day of October, 1904; and,

Whereas, Thereafter the City Council of said city, did, by an ordinance known as Ordinance No. 10177 (new series) which was duly adopted on the 21st day of November, 1904, order the holding of a general municipal election in said City of Los Angeles on the 5th day of December, 1904, (at least 40 days after the publication of said proposed amendments for 20 days in said daily newspaper of general circulation in said City of Los Angeles, to wit: "The Los Angeles Daily Times") and did provide in said ordinance for the submission of said proposed amendments to the said charter to the qualified electors of said city for their ratification at said general municipal election, which said ordinance was approved by the Mayor of said city on the 22nd day of November, 1904, and was published for at least ten days prior to the time appointed for the holding of said election, in

"The Los Angeles Daily Times," a daily newspaper printed and published in said city; and,

Whereas, At said election a majority of the qualified electors voting thereon voted in favor of the ratification of, and did ratify each and all of said proposed amendments to said charter; and,

Whereas, The City Council of said City of Los Angeles, at a special meeting thereof held within ten days after said election, duly canvassed the returns of said election, and duly found, determined, and declared that a majority of such qualified electors, voting thereon, had voted for and ratified each and all of the said proposed amendments to said charter; and,

Whereas, The said proposed amendments so ratified have been duly presented and submitted to the Legislature of the State of California for approval or rejection without power of alteration or amendment, in accordance with Section eight, of Article eleven of the Constitution of the State of California;

Now, therefore, be it

Resolved, By the Assembly of the State of California, the Senate concurring (a majority of all members elected to each House voting for the adoption of this resolution and concurring herein), that the said amendments to the said Charter of said City of Los Angeles hereinbefore set forth as presented, and submitted to and adopted and ratified by the qualified electors of said city, be and the same are hereby approved as a whole for and as amendments to the said Charter of said City of Los Angeles.

We, the undersigned, Owen McAleer, Mayor of the City of Los Angeles, State of California, and H. J. Lelande, City Clerk of said city, do hereby certify as follows, to wit:

That the City of Los Angeles, in the County of Los Angeles, State of California, contains a population of over one hundred thousand inhabitants, and has been ever since the year 1889, and is now, organized and acting under a freeholders' Charter, adopted under and by virtue of Section eight, of Article eleven, of the Constitution of the State of California, which

Charter was duly ratified by a majority of the qualified electors of said city at a special election held for that purpose on the 20th day of October, 1888, and approved by the Legislature of the State of California on the 31st day of January, 1889. (Statutes of 188[illegible], page 455.)

That the City Council of said City of Los Angeles, did, by Ordinance No. 9949, (new series) adopted by said Council on the 3rd day of October, 1904, and approved by the Mayor of said city on the 3rd day of October, 1904, and pursuant to Section eight of Article eleven of the Constitution of the State of California, duly propose to the qualified electors of said City of Los Angeles certain amendments to the Charter of said city, to be submitted to said qualified electors at a general municipal election to be held in said city on the 5th day of December, 1904, which said amendments were and are in the words and figures as follows, to wit:

* * * * * * * * * * * *

[Here follows text of the amendments to the Charter ratified December 5, 1904, and approved February 7, 1905.]

That said proposed amendments were, and each of them was, published for 20 days in a daily newspaper, printed and published in said city, and of general circulation therein, to wit: "The Los Angeles Daily Times," said publication ending on the 23rd day of October, 1904.

That thereafter the City Council of said city, did, by an ordinance known as Ordinance No. 10177 (new series) which was duly adopted on the 21st day of November, 1904, order the holding of a general municipal election in said City of Los Angeles on the 5th day of December, 1904, (at least 40 days after the publication of said proposed amendments for 20 days in said daily newspaper of general circulation in said City of Los Angeles, to wit: "The Los Angeles Daily Times"), and did provide in said ordinance for the submission of said proposed amendments to the said charter to the qualified electors of said

city for their ratification at said general municipal election, which said ordinance was approved by the Mayor of said city on the 22nd day of November, 1904, and was published for at least ten days prior to the time appointed for the holding of said election in "The Los Angeles Daily Times," a daily newspaper printed and published in said city.

That at said election a majority of the qualified electors voting thereon voted in favor of the ratification of and did ratify each and all of said proposed amendments to said charter.

That the City Council of said City of Los Angeles, at a special meeting thereof held within ten days after said election, duly canvassed the returns of said election, and duly found, determined, and declared that a majority of such qualified electors, voting thereon, had voted for and ratified each and all of the said proposed amendments to said Charter.

In Witness Whereof, we have hereunto set our hands and affixed the corporate seal of the City of Los Angeles, this eleventh day of January, 1905.

OWEN MCALEER,
*Mayor.*

H. J. LELANDE,
*City Clerk.*

(Seal)

FRANK C. PRESCOTT,
*Speaker of the Assembly.*

ALDEN ANDERSON,
*President of the Senate.*

Attest:
C. F. CURRY,
*Secretary of State.*

Endorsed: Filed in the office of the Secretary of State, the 16th day of February, A. D. 1906.

C. F. CURRY,
*Secretary of State.*

By J. HOESCH, *Deputy.*

# Appendix IV

SENATE CONCURRENT RESOLUTION No. 7.

Adopted in senate, February 19, 1907.

LEWIS A. HILBORN,
*Secretary of the Senate.*

Adopted in assembly, ....., 1907.

CLIO LLOYD,
*Chief Clerk of the Assembly.*

This resolution was received by the governor, this ..... day of ....., A. D. 1907.

E. C. COOPER,
*Private Secretary of the Governor.*

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SENATE CONCURRENT RESOLUTION No. 7, approving four certain amendments to the charter of the city of Los Angeles, in the county of Los Angeles, state of California, voted for and ratified by the qualified electors of the said city of Los Angeles at the general municipal election held therein on the fourth day of December, 1906.

(Adopted February 19, 1907.)

Whereas, the city of Los Angeles, in the county of Los Angeles, state of California, contains a population of over one hundred thousand (100,000) inhabitants, and has been ever since the year 1889, and is now, organized and acting under a freeholders' charter adopted under and by virtue of section 8 of article XI of the constitution of the state of California, which charter was duly ratified by a majority of the qualified electors of said city at a special election held for that purpose on the 20th day of October, 1888, and approved by the legislature of the

state of California, on the 31st day of January, 1889, (Statutes of 1889, p. 455); and,

Whereas, the city council of said city of Los Angeles did, by ordinance No. 13394 (New Series), adopted by said city council on the 3d day of October, 1906, and approved by the mayor of said city on the 3d day of October, 1906, and pursuant to section 8 of article XI of the constitution of the state of California, duly propose to the qualified electors of said city of Los Angeles the four certain amendments hereinafter set forth to the charter of said city, to be submitted to said qualified electors at a general municipal election, to be held in said city on the 4th day of December, 1906, and,

Whereas, said four proposed amendments hereinafter set forth were, and each of them was, published for twenty days in a daily newspaper printed and published in said city, and of general circulation therein, to wit: "The Los Angeles Daily Journal," said publication ending on the twenty-third day of October, 1906; and,

Whereas, thereafter the city council of said city did, by an ordinance designated as ordinance Number 13610 (New Series), which was duly adopted on the nineteenth day of November, 1906, order the holding of a general municipal election in said city of Los Angeles on the fourth day of December, 1906, (at least forty days after the publication of said four proposed amendments hereinafter set forth for twenty days in said daily newspaper of general circulation in said city of Los Angeles, to wit, "The Los Angeles Daily Journal"), and did provide in said ordinance for the submission of said four proposed amendments to the said charter, to the qualified electors of said city for their ratification at said general municipal election, which said ordinance was approved by the mayor of said city on the nineteenth day of November, 1906, and was published for at least ten days prior to the time appointed for the holding of said election, in "The Los Angeles Daily Journal," a daily newspaper printed and published in said city; and,

Whereas, at said election a majority of the qualified electors voting thereon, voted in favor of the ratification of, and did ratify each and all of said four proposed amendments hereinafter set forth to said charter; and,

Whereas, the city council of said city of Los Angeles, at regular and at special meetings thereof, held within ten days after said election duly canvassed the return of said election, and duly found, determined and declared that a majority of such qualified electors voting thereon, had voted for and ratified each and all of the said four proposed amendments to said charter; and,

Whereas, the mayor and city clerk of said city of Los Angeles did, on the 22d day of January, 1907, duly certify to the submission to the electors of said city of said four proposed amendments to said charter and to the ratification of said four amendments, and did further certify to a copy of said four proposed amendments, authenticated by the seal of the said city of Los Angeles, which said certificate is in the words and figures following, to wit:

City of Los Angeles, State of California, County of Los Angeles—ss.

We, the undersigned, A. C. Harper, mayor of the city of Los Angeles, state of California, and Harry J. Lelande, city clerk of said city, do hereby certify and declare as follows:

That the city of Los Angeles, in the county of Los Angeles, state of California, contains a population of over one hundred thousand inhabitants, and has been ever since the year 1889, and is now, organized and acting under a freeholders' charter, adopted under and by virtue of section eight, of article eleven, of the constitution of the state of California, which charter was duly ratified by a majority of the qualified electors of said city at a special election held for that purpose on the 20th day of October, 1888, and approved by the legislature of the state of California on the 31st day of January, 1889, (Statutes of 1889, page 455);

## CITY OF LOS ANGELES.

That the city council of the city of Los Angeles did, by ordinance No. 13394 (New Series), adopted by said city council on the 3d day of October, 1906, and approved by the mayor of said city on the 3d day of October, 1906, and pursuant to section eight, of article eleven, of the constitution of the state of California, duly propose to the qualified electors of said city of Los Angeles four certain amendments to the charter of said city to be submitted to said qualified electors at a general municipal election to be held in said city on the 4th day of December, 1906; which said amendments were and are in the words and figures following, to wit:

(Here follows text of the amendments to the charter ratified December 4, 1906, and approved ....., 1907.)

### Amendment Number One.

That section sixty-five of the charter be amended to read as follows:

Sec. 65. The officers of the city shall receive, in full compensation for all services of every kind whatever, rendered by them, the following salaries, payable in monthly installments at the end of each calendar month:

The mayor shall receive $3,600 per annum.

Each councilman shall receive $1,200 per annum.

The city clerk shall receive $2,400 per annum.

The city auditor shall receive $3,000 per annum.

The city assessor shall receive $2,400 per annum.

The city treasurer shall receive $2,400 per annum.

The city engineer shall receive $5,000 per annum.

The city attorney shall receive $3,000 per annum.

The chief of police shall receive $3,000 per annum.

The health officer shall receive $3,600 per annum.

The city tax and license collector shall receive $3,000 per annum.

Each member of the board of public works shall receive $3,600 per annum.

That subdivision (e) of section one hundred forty-three of the charter be amended to read as follows:

(e) The board shall appoint a secretary, not a member of the board, who shall receive an annual salary of $2,400, payable in equal monthly installments. He shall keep a record of all its transactions, specifiing therein the names of the commissioners present at all the meetings, and giving the ayes and noes upon all votes. He shall post and publish all orders, resolutions and notices, which the board shall order to be posted or published, and shall perform such other duties as are herein or may be, by order of the board, imposed upon him.

That subdivision (h) of section one hundred forty-three of the charter be amended to read as follows:

(h) The board of public works shall appoint and employ a civil engineer of not less than five years' professional experience, who shall be designated as the city engineer. He shall receive a salary of $5,000 per annum, and shall hold office at the pleasure of the board. He shall perform such civil engineering and surveying necessary in the prosecution of public work done under the direction or supervision of the board as said board may require. He shall make such certificates and reports upon the progress of such work, and shall make such surveys, inspections, and estimates, and perform such other surveying or engineering work, as may be required by said board or by the city council. He shall have all the powers and perform all the duties that are now or may hereafter be conferred or imposed by law, or by ordinance, upon the city engineer. He shall devote his entire time to the duties of his office, and shall receive no compensation in addition to his salary.

AMENDMENT NUMBER TWO.

That a new section be added to the charter, to be known as section one hundred forty-six and one-half, and to read as follows:

Sec. 146½. The board of public works shall have power to

acquire and take by purchase, condemnation or otherwise, in the name of the city any and all property that may be necessary or convenient for the construction or completion of any public work or improvement, the construction or completion of which the board of public works has charge, superintendence, or control, and the cost of which is to be paid from the proceeds of bonds issued and sold by said city.

That section one hundred and forty-eight of the charter be amended to read as follows:

Sec. 148. All contracts for the performance or furnishing of labor, materials or supplies, required for the execution of any service of which the board of public works has charge, superintendence or control, or for the construction or completion of any work or improvement of the construction or completion of which said board has charge, superintendence or control, except public work or improvements, the cost or expenses of which are to be paid by assessment upon property in proportion to frontage or benefits and except as hereinafter provided, shall be let and entered into in behalf of the city by the board in the following manner:

Every such contract shall first be authorized by resolution passed by a vote of two-thirds of the members of the whole council. The board shall, except in cases of urgent necessity, as hereinafter provided, upon the passage of the resolution authorizing such contract, cause a notice to be posted conspicuously in its office and published one or more times in a newspaper of general circulation printed and published in the city of Los Angeles, inviting sealed bids for the performance or furnishing of the labor, service, materials or supplies required. Said notice shall require the bids to be filed with the board at or before a certain hour of a day to be specified in the notice, and shall contain a general description of the work, service, materials or supplies to be performed or furnished, and the amount of the bond to be given for the faithful performance of the contract, and shall refer to plans and specifications on file in the office of the

board for full details and description of said work, service, materials or supplies.

Said notice shall require each bid to be accompanied by a check certified by a responsible bank, payable to the order of the president of the board for an amount not less than five per cent of the aggregate sum of the bid, or by a satisfactory bond for the said amount and so payable, as a guarantee that the bidder will enter into the proposed contract if the same is awarded to him, and the form and manner of making bids may, in all other respects, be prescribed in said notice, and no bid shall be considered unless the same is accompanied by said check or bond and is made in the prescribed form and manner. On the day and at the hour specified in the notice inviting bids the board shall meet and in open session examine and publicly declare the bids received. The board shall award the contract to the lowest regular, responsible bidder, or shall reject all bids. The board shall reject the bid of any party who has been delinquent or unfaithful in the performance of any former contract with the city, and shall reject all bids other than that of the lowest regular, responsible bidder. Upon rejecting any bids the board shall return to the proper parties the checks accompanying the rejected bids. The check accompanying the accepted bid shall be held by the secretary of the board until the contract for performing the work or service or furnishing the materials or supplies proposed to be done or furnished has been entered into. If the successful bidder fails to enter into the contract, or to execute the bond required for the faithful performance thereof, within ten days after the same is awarded to him, then the certified check accompanying his bid shall be presented for payment and collected, and the amount thereof paid into the general funds of the city. Every contract entered into by the board shall first be approved as to form by the city attorney and shall contain detailed specifications and plans of the work or service to be done, the manner in which it is to be performed, and quantity and kind of ma-

terials or supplies to be used or furnished, or shall refer to such specifications and plans on file in the office of the board. Said contract shall be signed on behalf of the city by the president or by two of the members of the board and by the other contracting party. The contractor shall enter into and deliver to the secretary of the board a bond, in the sum named in the notice inviting bids, conditioned for the faithful performance of the contract and executed by the contractor and by a responsible surety company or by two or more sufficient sureties approved by the board.

When any repairs, alterations, work or improvement shall be deemed of urgent necessity by the board, a contract for the performance or furnishing of the labor, materials, or supplies required therefor may be made by the board in behalf of the city, in writing or otherwise, without advertising for or inviting bids; provided, that if the contract for the furnishing of the labor, materials or supplies so required involves an expenditure of more than $500, the resolution of the council authorizing the same, shall, before it takes effect, be approved by the mayor; provided, however, that authorization or approval by the council or the mayor shall not be required in the case of any contract proposed to be made by the board, after advertisement for and inviting bids, as above provided, for the performance or furnishing of labor, materials, or supplies required for the construction or completion of any work or improvement, of the construction or completion of which the said board has charge, superintendence or control, and the cost of which is to be paid from the proceeds of bonds issued and sold by the city; and, provided, further, that authorization or approval by the council or mayor, or advertisement for or inviting bids shall not be required in the case of any contract proposed to be made by the board for the performance or furnishing of labor, materials, or supplies required as aforesaid, when such contract does not involve an expenditure of more than five hundred dollars.

That a new section be added to the charter, to be known as section one hundred and fifty and to read as follows:

Sec. 150. The board of public works shall present to the city council at its meeting in the second week of December in each year, a report for the year ending on the thirtieth day of November next preceding, which shall show the amount of money received from the sale of bonds, the purposes for which such money has been expended, the amount so expended, and the balance on hand in each bond fund, and also, such information and suggestions as it may deem of general interest; and the board of public works shall also, on or before the tenth day of each month make out and present to the city council a similar statement of all expenditures during the preceding month of the moneys derived from the sale of bonds.

That a new section be added to the charter, to be known as section 151, to read as follows:

Sec. 151. When the construction or completion of any public work or improvement, the cost of which is to be paid out of the proceeds of the sale of bonds, is to be carried on outside the city of Los Angeles, and the board of public works shall deem it necessary or convenient that any part of the money to be expended for the cost of such work or improvement shall be disbursed at any point or points outside said city, said board may appoint a disbursing agent, whose duty it shall be to disburse such money, in the manner hereinafter specified. The said disbursing agent shall enter into and deliver to the said board a bond payable to the city, in a sum to be fixed by said board, conditioned for the faithful performance of his duties, executed by himself, and by a responsible surety company, or if required by the board, by two or more sufficient sureties approved by the board, and said board may, from time to time, require from said disbursing agent, a new bond, or such additional bond as it may deem proper. Said board shall, after the execution and delivery of such bond, by resolution, authorize the payment and delivery to said disbursing agent of such sum of money as it

may deem proper, and said sum shall thereupon be paid to said disbursing agent by the city treasurer upon a demand approved by the board as in other cases out of the fund from which the cost of said work or improvement is to be paid, and the receipt of said disbursing agent therefor shall release the city treasurer from all liability for the money so paid. Provided, however, that said board shall not authorize the payment to said disbursing agent of any money which, together with the moneys already paid to him and remaining unexpended as herein provided, shall exceed fifty per cent of the amount of the bond of said disbursing agent.

That said disbursing agent shall thereafter pay out said money as may be required in the prosecution of said work for services or for material and supplies, but no money shall be paid by him except upon order of said board of public works and upon vouchers or demands certified to be correct by the officer or agent of the city under whose direction the services are rendered or the materials or supplies used.

Said disbursing agent shall, on or before the tenth day of each calendar month, and at such other times as may be required by said board of public works, render to said board an account showing the amount of money in his hands on the first day of the preceding calendar month, all amounts received, and all moneys disbursed by him during said preceding month and the amount of money remaining in his hands on the last day of said preceding month.

Said disbursing agent shall perform such other duties and comply with such rules and regulations as the board of public works may prescribe. Said agent shall be exempt from the provisions of the civil service, and shall receive such salary as the council by ordinance may fix.

That section two hundred and nine of the charter be amended to read as follows:

Sec. 209. Said demands, except demands payable out of the school fund, the library fund, water revenue fund or funds derived

from the sale of bonds issued by the city of Los Angeles, shall be presented to the council on forms and blanks to be provided by the city clerk, and shall be referred to its committee on finance. The said committee shall, by indorsement thereon, approve or reject the same in whole or in part. The council shall then consider the said demands and the action of said committee thereon, and shall, if the same be just and legal, approve the same; or may, if it so determine, approve in part or reject the whole. The action of the council shall be indorsed thereon, with the date of such action, and certified by the signature of the president and city clerk; provided, that it shall require the votes of two-thirds of the members of the whole council, under a call of the ayes and noes, and the vote spread upon the minutes, to approve any such demand in whole or in part.

That a new section be added to the charter, to be known as section two hundred thirteen and three-quarters, and to read as follows:

Sec. 213¾. All demands payable out of funds derived from the sale of bonds issued by the city of Los Angeles to pay the cost of constructing or completing any public work, improvement, or building must be presented to the board of public works, and, before they can be approved by the city auditor or paid must be previously approved by the board of public works, by a vote of two members thereof, taken by the ayes and noes spread upon the minutes of the board and the action of said board must be indorsed on said demand by the president and secretary thereof, or in the absence of the president, by two members and the secretary thereof. After the approval of said demands by the board of public works, they shall be delivered to the city auditor, who shall have the same power and perform the same duties in reference to demands payable out of funds derived from the sale of bonds, as are prescribed for other demands, provided, that in case the city auditor shall reject any of such demands or if, in his opinion, said

demand should be paid only in part, he shall return the same to the board of public works, instead of to the council.

That section two hundred fourteen of the charter be amended to read as follows:

Sec. 214. Any demand returned to the city clerk, with the objections of either the mayor or city auditor, shall again be considered by the council, and if it shall again be approved by the council by the same vote taken and recorded and indorsed in the same manner as required by section 209 hereof, the said objection shall be thereby overruled. Any demand returned to the board of education, the board of directors of the Los Angeles public library, the board of public works, or the board of water commissioners, with the objections of the auditor, shall again be considered by such board, and if such demand be again approved, as required in the first instance such objections of the said auditor shall be thereby overruled. Any demand, the objections to which of the mayor have been overruled, shall be delivered to the city auditor, who shall have the same power and perform the same duties in reference thereto as if the same had been approved by the mayor. Any demand the objection to which of the city auditor has been overruled by the council, the board of education, the board of directors of the Los Angeles public library, the board of public works, or the board of water commissioners, as the case may be, shall be delivered to the city auditor, who shall number and make a record of such demand, as in the case of demands approved by him.

That section two hundred twenty-two of the charter be amended to read as follows:

Sec. 222. No suit shall be brought on any claim for money or damages against the city of Los Angeles, its board of education, board of directors of the Los Angeles public library, board of public works, or the board of water commissioners, until a demand for the same has been presented as herein provided, and rejected in whole or in part. If rejected in part, suit may be brought to recover the whole. Nor shall suit be brought against

said city, or said board of education, board of directors of the Los Angeles public library, board of public works, or board of water commissioners, upon any claim or demand that has been in whole approved and audited as provided herein; provided that nothing herein contained shall be construed so as to deprive the holder of any demand of his right to resort to a writ of mandamus or other proceedings against the city council or any board or officer of said city, to compel it or him to act upon such claim or demand, or to pay the same when so audited.

AMENDMENT NUMBER THREE.

That a new section be added to the charter, to be known as section two hundred and thirty-seven and one-half, and to read as follows:

Sec. 237½. Any civil service employee who is injured in the service of the city while actually engaged in the discharge of the duties of his position, may, in the discretion of the board of civil service commissioners, be assigned to a position other than that for which he has been examined, and with or without examination. Said commissioners, upon assigning such person so injured to such new position, shall place his name at the head of the eligible list, and he shall thereafter be first certified for such position. The board of civil service commissioners shall not place such person so injured as aforesaid at the head of any eligible list without carefully examining the facts of each case, and making its finding that such person is not incompetent, by reason of physical or other disability, to fill the same. Nothing in this provision shall be construed as compelling said commissioner to take the action herein provided for unless the person injured is, in the judgment of said commission, of good moral character and worthy of receiving the benefits hereof.

That section two hundred and thirty -nine of the charter be amended to read as follows:

Sec. 239. The provisions of this article shall apply to the following departments of the city, to wit:

The department of the city clerk,
The department of electricity,
The fire department,
The treasurer's department,
The tax collector's department,
The police department,
The auditor's department,
The assessor's department,
The health department,
The department of building,
The department of public works,
The waterworks department,
The public library,
The park department,
The city engineer's department,
The street department,
All departments of public utilities,
All other employees of the city;

Provided, that the following shall be exempt therefrom, to wit:

All officers elected by the people,
All members of the different boards and commissions,
The mayor's clerk,
The chief of police and his secretary,
The chief deputy of the treasurer,
The chief engineer and his chief deputy.
The chief deputy and cashier of the tax collector,
The chief deputy of the auditor,
The city superintendent of schools and his deputies and teachers,
The assistants and stenographers of the city attorney,
The city prosecutor and the assistant city prosecutors,
The librarian,
The superintendent of parks,
The secretary of the park commission,

The secretary of the police commission,

The superintendent of buildings,

The humane officer,

The chief engineer of the fire department,

The superintendent, water overseer, auditor and cashier of the waterworks department,

All physicians appointed on or by the board of health,

All officers of election,

The police surgeons,

And any of the following persons may be exempted from the provisions of this article, upon the request of the head of the department in which they are employed, by order of the board of civil service commission, approved by the council by resolution passed by the vote of two-thirds (2-3) of all its members, to wit: (a) The first and second deputies in any department or either of such deputies where not exempt, as above provided. (b) Unskilled laborers, including drivers. (c) Persons employed on the construction of public works, improvements or buildings. (d) Persons employed to render professional, scientific, technical or expert services of an occasional and exceptional character. Any exemption thus made may be terminated at any time by resolution of the board of civil service commissioners.

AMENDMENT NUMBER FOUR.

That section 212 of the charter be amended to read as follows:

Sec. 212. All demands payable out of the school fund must, before they can be approved by the city auditor, or paid, be previously approved by the board of education, by a vote of five members thereof taken with the ayes and noes and spread on the minutes, and the action of said board indorsed on said demand and signed by the presiding officer and the clerk thereof. After the approval of said demands they shall be delivered to the city auditor, who shall have the same powers and shall perform the same duties in reference to demands payable out of the school fund as is provided for other demands; provided that in case the city auditor shall reject any such demand, or if in his

opinion said demand should be paid only in part he shall return the same to the board of education, instead of the council.

That said four proposed amendments were, and each of them was, published for twenty days in a daily newspaper printed and published in said city and of general circulation therein, to wit, "The Los Angeles Daily Journal", and that said publication ended on the 23d day of October, 1906;

That thereafter the city council of said city, did by ordinance No. 13610 (New Series), which was duly adopted on the 19th day of November, 1906, order the holding of a general municipal election in said city of Los Angeles on the 4th day of December, 1906, (at least forty days after the publication of said proposed amendments for twenty days in said daily newspaper of general circulation in said city of Los Angeles, to wit, "The Los Angeles Daily Journal"), and did provide in said ordinance for the submission of said four proposed amendments hereinabove set forth to the said charter to the qualified electors of said city for their ratification at said general municipal election, which said ordinance was approved by the mayor of said city on the 19th day of November, 1906, and was published for at least ten days prior to the time appointed for the holding of said election in "The Los Angeles Daily Journal," a daily newspaper printed and published in said city;

That at said election a majority of the qualified electors voting thereon voted in favor of the ratification of and did ratify each and all of the four proposed amendments to the charter of the city of Los Angeles, hereinabove set forth;

That the city council of the city of Los Angeles, at regular and at special meetings thereof, and within ten days after said election, which said regular and special meetings were held in the manner prescribed by law, duly canvassed the returns of said election, and duly found, determined and declared that a majority of such qualified electors voting thereon had voted for and

ratified each and all of the said four proposed amendments to said charter hereinabove set forth;

We do further hereby certify and declare that the copy of said four proposed amendments to the charter of the city of Los Angeles hereinabove set forth is a full, true and correct copy of the four certain proposed amendments to the charter of the city of Los Angeles, which were, in the manner prescribed by law, submitted to the qualified electors of said city for their ratification and by them ratified at the general municipal election duly called and held in said city on the 4th day of December, 1906, as aforesaid.

In witness whereof, we have hereunto set our hands and affixed the corporate seal of the city of Los Angeles, this 22nd day of January, 1907.

(Seal)

A. C. HARPER,
*Mayor of the City of Los Angeles,*

HARRY J. LELANDE,
*City Clerk of the City of Los Angeles.*

And whereas, the said four proposed amendments so ratified as hereinabove set forth have been duly presented and submitted to the legislature of the state of California for approval or rejection, without power of alteration or amendment, in accordance with section 8 of article XI of the constitution of the state of California;

Now, therefore, be it resolved by the senate of the state of California, the assembly concurring (a majority of all members elected to each house, voting for the adoption of this resolution and concurring herein), that the said amendments to the said charter of said city of Los Angeles hereinabove set forth, as presented, and as submitted to and adopted and ratified by the qualified electors of said city, be and the same are hereby approved, as a whole, for and as amendments to the said charter of said city of Los Angeles.

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# Supreme Court of the United States.

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BRIEF FOR APPELLEE.

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IN THE

# Supreme Court of the United States.

**OCTOBER TERM.**

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**No. 441.**

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**Home Telephone and Telegraph Company,**
*Appellant,*

*vs.*

**The City of Los Angeles, A. C. Harper, Mayor, and R. W. Dromgold, et al., Members of the Common Council,**
*Appellees.*

## BRIEF FOR APPELLEES.

This cause was appealed from the Circuit Court of the United States for the Southern District of California, Southern Division, from a decree entered August 5th, 1907, dismissing the amended and supplemental bill of complaint.

## STATEMENT OF THE CASE.

The opinion of the court below is an exhaustive discussion of the questions involved and fully supports the appellees' contentions. We set forth the same in full and incorporate the same as a part of this brief. We will first quote the statement of the case as given by the Circuit Court and add thereto such other facts as are pertinent to the case. After the opinion of Judge Wellborn, sitting as circuit judge, we will supplement the same with additional points and authorities gathered by us in further research, and then discuss certain other phases of the case. The opinion of the court below is reported in 155 Fed. 554, 583.

### *Statement by the Circuit Court.*

The statement of the case as given by the court below is as follows:

This suit was brought to restrain the enforcement of two ordinances attached to the bill respectively as Exhibits C and D, and hereinafter more fully set forth.

The allegations of the bill are substantially as follows:

The city of Los Angeles exists, and since 1888 has existed under a freeholders' charter.

That by section 2 of said charter, said city is vested with power to provide and maintain a proper and efficient fire department, and make and adopt such rules and regulations for the preservation of property endangered by fire as may by it be deemed expedient, and to make and enforce within its limits local police, sanitary and other regulations deemed by it expedient to main-

tain the public peace and protect property, and to exercise all municipal powers necessary to the complete and efficient management of the municipal government, whether such powers be expressly enumerated in such charter or not, except such powers as are forbidden or are controlled by general laws.

That all legislative power of said city is vested in the city council, subject to the power of veto and approval by the mayor.

That under section 31 of said charter, said council has power by ordinance to regulate telephone service and the use of telephones within the city and to fix and determine the charges for telephone and telephone service and connections, and to prohibit or regulate the erection of poles for telephones, telegraph or electric wires in the public grounds, streets or alleys of said city, and the placing of wires thereon, and to require the removal from the public grounds, streets, or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone or electric wires.

That by section 33 of said charter the council is required by ordinance to provide for maintaining a fire alarm and police telegraph system.

That "it is further provided in and by said charter that said council shall also have full power to pass ordinances making contracts and upon any other subject of municipal control or to carry into effect any other powers of the municipality."

That prior to December the 9th, 1901 an application was filed with the governing or legislative body of defendant by M. A. King for a franchise to construct,

maintain and operate a telephone system, and that, on the 6th day of February, 1902, an ordinance, attached to the bill as Exhibit B was passed granting said franchise, and that all the steps and proceedings required by law and the provisions of said charter for the advertisement and sale of said franchise and the approval thereof, and all other matters connected therewith were duly had and taken.

That, by regular assignments from M. A. King and others, plaintiff became and now is the owner of said franchise and telephone system.

That immediately upon the taking effect of said ordinance as aforesaid, the assignors of this plaintiff, pursuant to the terms thereof, commenced the work of constructing and laying down the conduit required by said ordinance in the district therein described, and continuously prosecuted said work in good faith and completed the same in full compliance with the conditions of said ordinance relating thereto, and within the period therein prescribed, so that within said period a complete conduit system was established of sufficient capacity and extent to accomodate at least 10,000 subscribers and to provide a general telephone service in all parts of said telephone conduit district, and that likewise the said assignors of this plaintiff did, pursuant to the terms and conditions of said ordinance and in good faith expend for material and labor used and performed in the construction and installation in connection therewith of wires, switchboards and telephonic apparatus and appliances, and within the time specified in said ordinance sums greatly in excess of the sums therein specified to

be so expended, and did so expend more than the sum of $200,000 within thirty-six months after the grant of said franchise.

That the assignors of plaintiff did also, within the periods of said ordinance provided, after the grant of said franchise, file a statement, verified as therein provided, showing in detail the sums expended as required by and in compliance therewith, and did also cause to be erected and maintained poles of a size and character satisfactory to the street superintendent of said city of Los Angeles, and that the assignors of said plaintiff and this plaintiff have executed and complied with and observed, and that the said defendant, the city of Los Angeles, has never at any time claimed or pretended that plaintiff's assignors and this plaintiff had not executed, complied with and observed the terms, covenants and provisions of said ordinance as aforesaid.

That all of the work done and performed by plaintiff's assignors and by this plaintiff as aforesaid, and the expenditures made by it for any and all equipment and appliances as aforesaid, were made, done and performed pursuant to and in reliance upon the terms, covenants and provisions of said ordinance No. 6959 of said city of Los Angeles, and not otherwise; and that the system of plaintiff in said city of Los Angeles is now and at all times has been maintained and operated pursuant to and in reliance upon the terms, conditions and covenants of said ordinance and not otherwise, and that plaintiff has no rights of property in the said city of Los Angeles except such as were acquired under the said ordinance No. 6959.

That pursuant to the powers vested in it by law and the provisions of said charter, and in order to provide for maintaining a fire system and police telegraph system, the said defendant the city of Los Angeles required in and by section 8 of the said ordinance that this plaintiff should furnish to the said city of Los Angeles, if required by it, free of any charge at all during the life of the said franchise granted by said ordinance, the use of all necessary conductors, not exceeding 150 pairs in said conduit, for the uninterrupted use of a fire system and police system of said city, and for like purpose the free use of the top cross arm on each of the poles erected or maintained under said franchise during the whole term thereof; that this plaintiff in constructing and laying said conduits and in constructing and erecting its poles, lines and in providing its equipment, made provision for said 150 pairs of lines in said conduits and for the maintenance and operation thereof, and provided that said top cross-arms on each of said poles, and in all respects and at additional cost and expense to it arranged to comply with such provisions of said ordinance, and is now, and at all times has been, able and willing to furnish said conductors, and has as aforesaid reserved the top cross-arm on each of said poles for the use of said city.

That it is also provided in and by section 8 of said ordinance that there shall be furnished to the said city of Los Angeles, free of any charge, 30 telephones which shall be connected with the telephone system of plaintiff, and that this plaintiff did, within the time provided and specified in said franchise, so furnish to the defendant

said 30 telephones, and did connect the same with the telephone system of this plaintiff, all at its own cost and expense, and without charge to the said city of Los Angeles, and that the said city of Los Angeles is now, and ever since has been, using free of charge as aforesaid the said 30 telephones.

That section 1 of said ordinance provides: "That said conduit, said poles, and the wires enclosed therein or attached thereto, shall be constructed, erected and installed, and at all times maintained, and said right, privilege and franchise is hereby granted, and shall at all times be exercised and enjoyed, in accordance with and subject to each and every of the terms of this ordinance and not otherwise."

That section 9 of said ordinance provides: "That all telephone lines constructed or operated under said franchise shall have complete copper metallic circuits, and that the conduit system constructed and laid down under said franchise shall be of such size and capacity as to accomodate wires, cables and conductors, sufficient to provide ten thousand telephones. That the rent or charge for unlimited, independent, metallic circuit, telephone service, in the system established or maintained under said franchise so long as said system does not connect and exchange with more than 10,000 telephones, shall not exceed $60 per annum for a telephone installed in any business office or premises, or $30 per annum for a telephone installed in a private residence, and that when said system shall comprise more than 10,000 telephones, the annual rental or charge for the telephone service shall not be increased by more than a sum equal

to $6.00 per annum for each one thousand telephones in said city connected with said telephone system in excess of 10,000."

That the rate established by said franchise was at said time lower than any which had ever been charged for telephones in said city, and lower than any other company than plaintiff now charges for telephone service in said city, and that there was not at any of the times herein mentioned, any system of telephone lines with complete copper metallic circuits, other than the system of plaintiff.

That at the time of the advertising and sale of said franchise, there was in operation in said city of Los Angeles, one system of telephonic communication only, and that the corporation owning the same continues to do business in said city.

That at the time said franchise was advertised for sale and sold the city required the use of 150 pairs of lines as provided for in said franchise, and the use of the top cross arm of each pole to be erected under said franchise for the fire alarm and police telegraph system of said city needed the use of thirty telephones, as provided in said franchise; and all of said telephones have been used by the said city ever since the construction of said plant of plaintiff, and are now used by the city, and the city is using some of the lines in the conduit of plaintiff, and the top cross-arm of some of its poles, and the city has need for the things it is using as aforesaid, for public benefit and in the discharge of its functions.

That by section 10 it is provided that the owner of said franchise shall in no way enter into any combina-

tion at any time, directly or indirectly, with any person or persons, or any corporation, concerning the rate to be charged for telephone or telegraph service.

That the reasonable value to the said city of Los Angeles of the use of said 30 telephones provided by said franchise to be furnished free of charge, and the free use of one hundred and fifty pairs of lines for the fire system and police telegraph system of said city, and the free use of the top cross-arm on each of the poles erected and maintained under said franchise, are and will be during the life of said franchise of the sum of four hundred and fifty thousand dollars. That two per cent. of the gross annual receipts required by said franchise to be paid to the city of Los Angeles will amount to more than the sum of five hundred thousand dollars.

That the plaintiff and its assigns, acting under and pursuant to the terms of this franchise and not otherwise, and particularly on the clauses thereof declaring maximum rates, have constructed more than five miles of underground conduit and constructed more than one hundred miles of pole lines, and have installed more than twenty thousand telephones in said city, and did, in accordance with said franchise, and at great additional expense, construct and erect and is now operating a system of telephone lines having complete copper metallic circuits.

That, on March 27th, 1905, the city council of said city passed an ordinance, which is attached to the bill, marked Exhibit C, the twelfth section of which provides as follows: "Sec. 12. It is hereby made the duty of every person, firm or corporation supplying tele-

phones, telephone service or telephone connections to the city of Los Angeles or its inhabitants, to furnish to the city council in the month of January of each year, a statement in writing, verified by the oath of such person, or of a member of such firm, or of the president or secretary of such corporation, as the case may be, showing in detail, the amount received by such person, firm or corporation from the renting of telephones, the furnishing of telephone service and the making of telephone connections within the city of Los Angeles, and the revenue derived by such person, firm or corporation, or in any manner arising from the use or operation of a telephone system in the city of Los Angeles, during the year preceding the date of such statement, and showing in detail all expenditures made by such person, firm or corporation, during the same time for supplying telephones, telephone service and telephone connections to the city of Los Angeles and its inhabitants, and for the purchase, construction and maintenance respectively of the property necessary for the carrying on of such business. Every such person, firm or corporation shall furnish a detailed statement verified in like manner as the statement, hereinbefore in this section mentioned, containing an itemized inventory of all of the works, lines, plant and property owned or used by such person, firm or corporation and necessary or convenient to the carrying on of the business of supplying telephones, telephone service and telephone connections to the city of Los Angeles, or to the inhabitants thereof, and showing the actual cost and present cash value of each item thereof."

That plaintiff has not complied with said section 12 of ordinance C nor any part thereof, and plaintiff declines to comply therewith for the reasons herewith set forth.

That said city has arrested and commenced prosecution against plaintiff's officers, and will continue to arrest and prosecute plaintiff's officers for violations of ordinance C, unless restrained therefrom.

That defendant, on February 28th, 1906, passed an ordinance which is attached as Exhibit D to the bill, fixing rates to be charged by plaintiff for telephone service and forbidding plaintiff, under penalty of imprisonment, from collecting the rates provided and fixed in ordinance Exhibit B, and will, unless restrained by this court, continue from time to time to pass other similar ordinances.

That the said city, on February 28th, 1907, adopted another ordinance, attached to the bill as Exhibit E, whereby a competitor of plaintiff in said city, engaged in like business, was allowed to charge for telephone service sums greatly in excess of that which by said ordinance D plaintiff is permitted to charge.

That ordinances C and D, if carried into execution, will impair the obligations of a contract, Exhibit B, and deprive plaintiff of its property without due process of law, and abridge the privileges and immunities of this plaintiff, and deprive it of the equal protection of the law, and, that the adoption of said ordinances Exhibits D and E fixing the different rates to be charged for the same services deprives plaintiff of the equal protection of the law and discriminates against plaintiff in favor

of the Sunset Telephone and Telegraph company, a similar corporation, all of which is in violation of the Constitution of the United States, and particularly in violation of article 1, section 10, clause 1 of said Constitution of the United States, and the Fourteenth Amendment thereto, and also is in violation of the Constitution of the state of California.

That said ordinance D is void, for that it is not a general law adopted by said city for the government of all corporations similar in character to plaintiff, but is directed solely against, and applicable to plaintiff, and discriminates against plaintiff.

That said ordinances D and E are void, for that said city never had, under the Constitution and laws of the state of California, any power or authority to regulate or fix rates to be charged by telephone corporations for services rendered by them, except that the city of Los Angeles had and has the power to contract for rates to be charged, and had and has the right to contract in the manner and form as shown by said ordinance Exhibit B.

That, if the provisions of said charter operate to give the city of Los Angeles the right to fix rates other than by contract or purport or attempt to give it a continuing power to fix and regulate rates of this plaintiff, such provisions of said charter are void, for that in and by the Constitution of the state of California the power to fix such rates, if such power exists at all, can only be exercised by authority of a general law applicable to all municipalities and affecting all corporations similar to plaintiff, and, that the legislature of the state of Cali-

fornia has no authority by virtue of said Constitution or otherwise, to delegate the power of so fixing rates from time to time to any one municipality or other political subdivision at all, to the exclusion of the others, and has no authority by delegation of its powers to fix the rates to be charged by plaintiff.

That the legislature of said state of California has never passed nor is there now, nor has there ever been in force any general law or statute authorizing the fixing or regulation of rates as aforesaid, but that such general power has been and is withheld from other cities and municipalities within the state.

Ordinance D is as follows:

"EXHIBIT 'D'.

"Ordinance No. ——— (New Series.)

"An ordinance fixing the rates to be charged and collected by the Home Telephone and Telegraph company, a corporation, for telephones, telephone service and telephone connections, in the city of Los Angeles, during the year commencing July 1st, 1906, and ending June 30th, 1907.

"The mayor and council of the city of Los Angeles do ordain as follows:

"Section 1. That the rates to be charged and collected by the Home Telephone and Telegraph company, a corporation for telephones, telephone service and telephone connections in the city of Los Angeles, furnished to the city of Los Angeles, or to the inhabitants thereof, for the year commencing on the 1st day of July, 1906, and ending on the 30th day of June, 1907, are hereby fixed as follows:

"(1) For each telephone installed and maintained in any business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $5.00 per month.

"(2) For each telephone installed and maintained in any house or place other than a business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $2.00 per month.

"(3) For each extension telephone, $1.00 per month.

"(4) For each private telephone exchange connected with the central exchange by an independent circuit on one trunk line, $5.00 per month; and for each additional trunk line, $4.00 per month; and for each telephone station in such private exchange, $1.00 per month.

"Section 2. Any person who shall charge, demand, collect or receive, either as officer, agent, collector or employe of the said Home Telephone and Telegraph company, any rate or compensation for telephones, telephone service or telephone connections in the city of Los Angeles, furnished by the said Home Telephone and Telegraph company to the city of Los Angeles or to any inhabitants thereof, during the year commencing on the 1st day of July, 1906, and ending on the 30th day of June, 1907, in excess of the rates fixed by this ordinance, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punishable by a fine in a sum not exceeding one hundred dollars, or by imprisonment in the city jail for a period not exceeding ninety days, or by both such fine and imprisonment."

There is no express provision in the charter conferring upon the city contractual power, as alleged in the bill, and presumably that allegation is the statement of the pleader's conclusion as to an implied power. However, this matter, as appears from the opinion of the court, is immaterial here.

*Substance of Amendments and Supplemental Matter in the Bill.*

After the decision of the Circuit Court was rendered, and before judgment was entered, the complainant, under stipulation with the defendants, filed its amended and supplemental bill of complaint. While the new matter contained in the amended and supplemental bill we deem immaterial to the real issues of the case, nevertheless we set forth the same in substance as follows:

That the charter of the City of Los Angeles comprises 23 articles, the first of which declares what the corporate powers of said city are; the second names the officers of the municipality and the third defines and prescribes the powers and duties of the common council of the city.

That there have been issued since March 11, 1901, in California, a great many franchises for telephone plants, pursuant to the provisions of the act of the legislature of March 11, 1901; that all of said franchises specified the maximum rate as in exhibit "B" to be charged by such companies for service rendered in pursuance of the grant of said franchises and that many of said telephone systems, so granted, are connected with the system of complainant within the City of Los Angeles.

That since the passage of the act of the legislature of March 11, 1901, and other acts upon the same subject, hundreds of franchises have been sold and granted in pursuance thereof, and that nearly all of said franchises have contained provisions respecting the rate of compensation or charge to be made or received by the grantee; that various questions concerning the construc-

tion and validity of such franchises have come before the Supreme Court of the state of California and before the Federal courts and that until the defendant the City of Los Angeles attempted to fix the rates of the complainant there was never any contention but that the rates as fixed in the franchises were contractual or that the same were subject to change, alteration or reduction in any manner whatsoever during the period fixed by such franchises.

Complainant further alleges that the action of the defendant the City of Los Angeles in reducing the rates below the rates fixed in complainant's franchise is the first assertion by any municipality or county of any such power notwithstanding that many cities of California have been and now are organized and existing, and for many years last past have been under the laws of the state of California and with charters containing substantially similar provisions to those of the City of Los Angeles.

That the complainant and its predecessor in interest of said franchise at all times were advised and verily believed that pursuant to the several acts of the legislature with reference to the granting of such franchises including the act of 1901, the City of Los Angeles and other cities of the state of California had the power to grant franchises and therein fix rates for such term as the legislative bodies thereof might, under the circumstances, deem reasonable in each instance and had no power to alter or reduce such rates during said term.

That the cost of installation, maintenance and operation per telephone is very much greater proportionately as the number of telephones increases.



That for many years prior to the sale of said franchise to complainant, the telephone service provided for the residents of the City of Los Angeles was in the hands of one corporation which had a monopoly of such business; that the wires, pole lines, equipment, system and service of said last mentioned corporation were of the most inferior description and as a consequence the residents of the said city were greatly desirous of having a competing system, and particularly such a system as was and is described and provided for by the franchise now owned by the complainant.

That no other telephone company operating in said city is required to pay to said city any of its receipts nor to furnish to said city free service of any kind, and that the greatly increased growth of said city, both in population and territory, has greatly increased the expense of the complainant in furnishing said free telephone service in said city and said service for its police and fire departments and will continue so to increase during the life of said franchise.

That the complainant has no means of providing money for the extension of its system and for constructing additional pole lines and supplying additional telephones to the inhabitants of said city except by the sale of its bonds and stock, and that, owing to the passage by said common council of said ordinances, exhibits "C" and "D," the complainant is unable to sell said securities except at a great loss to it, and is unable to secure moneys wherewith to construct pole lines and supply tele-

phones to meet the demands made upon it for telephone service by the residents of said city.

That the rates prescribed and fixed by said ordinance exhibit "D" are different, lower and less remunerative than the rates agreed upon in said ordinance exhibit "B;" and if the said rates fixed by ordinance exhibit "D" are enforced against the complainant it will deprive the complainant of a large amount of money; to-wit, more than the sum of $25,000 per annum.

That at the time of the adoption of the charter of the City of Los Angeles in the year 1888 there was, and had been a long time prior thereto, and ever since has been in said city, a telephone system having more than 10,000 telephones operated by a corporation known as the Sunset Telephone Company; that the franchise under which said system was and is operated does not fix or in any way determine or attempt to determine the charge to be made for service or the use of telephones or telephone connections. That the City of Los Angeles never took any steps or passed any ordinance or any order concerning the regulation of the rates to be charged for telephone service within the city until the adoption of said ordinance, exhibit "C," on the 27th day of March, 1905.

By way of supplement the complainant alleges that on the 15th day of March, 1907, the city council passed an ordinance, a copy of which is attached to the amended and supplemental bill and is marked exhibit "F" and is made a part of said bill. That the rates prescribed by ordinance exhibit "F" are different, lower and less remunerative than the rates agreed upon in the ordinance exhibit "B," and that if the rates fixed by ordinance ex-

hibit "F" are enforced it will deprive the complainant of a large amount of money; to-wit, more than $30,000 per annum. That by the ordinance of the 15th day of March, 1907, the complainant is forbidden under penalty of fine and imprisonment from collecting the rates provided and fixed and agreed upon in said exhibit "B."

That on the said 15th day of March, 1907, the said council passed an ordinance marked exhibit "G" whereby it declared that a competitor of the complainant in the City of Los Angeles should be allowed to charge for telephone services sums greatly in excess of that, which by said ordinance, exhibit "F," the complainant is permitted to charge.

That the adoption and enforcement of ordinance exhibit "F" will, if permitted by the court, impair the obligation of said contract exhibit "B" and deprive the complainant of its property without due process of law and will abridge the privileges and immunity of the complainant and deprive it of the equal protection of the law. That the passage of ordinances "F" and "G" deprives the complainant of the equal protection of the law, discriminating against complainant in favor of the Sunset Telephone and Telegraph Company and similar corporations, all of which is in violation of article I, section 10, clause 1 of the Constitution of the United States and the fourteenth amendment to said constitution, and also in violation of the Constitution of the state of California.

That ordinance exhibit "F" is void and of no effect in that it is not a general law and rule adopted by said city of Los Angeles for the government of all corporations or persons similar in character to complainant, but is di-

rected solely against and is applicable only to this complainant and discriminates against the complainant.

*Further Statement by Appellees.*

In addition to the foregoing statement we desire to call attention to the following:

The charter of the City of Los Angeles was framed by a board of freeholders and adopted by the vote of the electors of the said city and approved by the legislature of the state in 1889, pursuant to the provisions of article XI, section 8, of the Constitution of the state of California (as amended in 1887), which provides as follows:

> "Sec. 8. * * * *Any city* or consolidated city and county *containing a population of more than* 10,000 *and not more than* 100,000 *inhabitants, may frame a charter for its own government, consistent with and subject to the constitution and laws of the state*, by causing a board of fifteen freeholders, who shall have been for at least five years qualified electors thereof, to be elected by the qualified voters of said city, or city and county, at any general or special election, whose duty it shall be, within ninety days after such election to prepare and propose a charter for such city, or city and county, which shall be signed in duplicate by the members of such board or a majority of them, and returned, one copy thereof to the mayor or chief executive officer of said city, or city and county, and the other to the recorder of the county, or city and county. Such proposed charter shall then be published in two daily papers of general circulation in said city, or city and county, for at least twenty days, and publication shall be commenced within twenty days after the completion of the charter; and within not less than thirty days after the completion of such publication it shall be submitted by the legislative authority of said city, or city and county, to

the qualified electors of said city, or city and county, at a general or special election, and if a majority of such qualified electors voting thereat shall ratify the same, *it shall thereafter be submitted to the legislature for its approval or rejection* as a whole, without power of alteration or amendment, and *if approved by a majority vote of the members elected to each house it shall become the charter of such city*, or if such city be consolidated with the county, then of such city and county, *and shall become the organic law thereof, and shall supersede any existing charter and all amendments thereof, and all special laws inconsistent with such charter.* A copy of such charter certified by the mayor, or other chief executive officer, and authenticated by the seal of such city, or city and county, setting forth the submission of such charter to the electors, and its ratification by them, shall be made in duplicate, and deposited, one in the office of the secretary of state, and the other, after being recorded in the office of the recorder of deeds of the county, or city and county, among the archives of the city, or city and county; and thereafter all courts shall take judicial notice thereof. A charter so ratified may be amended at intervals of not less than two years, by proposals therefor, submitted by the legislative authority of the city, or city and county, to the qualified electors thereof, at a general or special election held at least sixty days after the publication of such proposals, and ratified by at least three-fifths of the qualified electors voting thereat and approved by the legislature as herein provided for the approval of the charter. In submitting any such charter or amendments thereto any alternative article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others."

Section 6, of article XI, of the Constitution of the state, as the same was in force at the time of the adoption of the city charter of the City of Los Angeles, provided:

> "Sec. 6. Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and the classifications, in proportion to population of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws."

Section 6, of article XI, of the Constitution, as amended in 1896, and as since that time and now in force, provides:

> "Sec. 6. Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, *except in municipal affairs*, shall be subject to and controlled by general laws."

The words "except in municipal affairs" italicized by us in the last section quoted, were inserted therein by the amendment of said section in 1896, and was the only change thereby made.

The ordinance granting to the appellant company its franchise was passed by the city council on the 6th day of February, 1902, pursuant to a general law of the state of California, entitled, "An act providing for the sale of street railroad and other franchises in municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting laws." This statute appears in the statutes of California of 1901, at page 265, and became a law under a constitutional provision without the governor's signature on March 11, 1901, is commonly known as the "Broughton Act," and remained in force until amended in 1903. This act, exclusive of the caption and the repealing clause, is as follows:

> "Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any city and county, city or town within this state, except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise.

"Sec. 2. An applicant for any franchise or privilege above mentioned shall file with the governing or legislative body of the municipality an application, and thereupon said governing body shall, in its discretion, and when the application is accompanied with a petition praying that the same be granted, signed by the owners of three fourths of the frontage of the real property fronting along and upon the route of the franchise applied for, must advertise the fact of said application, together with a statement that it is proposed to grant the same, in one or more newspapers of the city and county, city or town wherein the said franchise or privilege is to be exercised. Said advertisement must state that bids will be received for such franchise, and that it will be awarded to the highest bidder, and the same must be published in such newspaper once a day for ten successive days, if it be a daily newspaper, and if there be no daily paper published in such city and county, city or town, then it shall be published in a weekly newspaper once a week for four successive weeks, and in either case the full publication must be completed not less than twenty (20) nor more than thirty (30) days before any further action can be taken thereon.

"Sec. 3. The publication must state the character of the franchise or privilege proposed to be granted, the term for which it is granted, and, if it be a street railroad, the route to be traversed; that sealed bids therefor will be received up to a certain hour and day named therein, and that the successful bidder and his assigns must, during the life of said franchise, pay to the municipality two per cent (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession. No percentage shall be paid for the first five (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable annually; and in the event said payment is not made, said franchise shall be forfeited; provided further, that

if the franchise be a renewal of a right already in existence, the payment of said gross receipts shall begin at once.

"Sec. 4. In case the franchise granted shall be an extension of an existing system of street railroad, then the gross receipts shall be estimated to be one-half of the proportion of the total gross receipts of said system which the mileage of such extension bears to the total mileage of the whole system, and said estimate shall be conclusive as to the amount of the gross receipts of said extension.

"Sec. 5. Said advertisement shall contain a statement that the said franchise will be granted to the person, firm or corporation who shall make the highest cash bid therefor; provided only, that at the time of the opening of said bids any responsible firm or corporation present, or represented, may bid for said franchise or privilege a sum not less than ten per cent above the highest sealed bid therefor, and said bid, so made, may be raised ten per cent by any other responsible bidder present, and said franchise or privilege shall finally be struck off, sold and granted by said governing body to the highest bidder therefor, in gold coin of the United States, and said successful bidder shall be required to deposit with said governing body, or such person as it may direct, the full amount of his or its said bid, within twenty-four hours thereafter; and in case he or it shall fail so to do, then the said franchise or privilege shall be granted to the next highest bidder therefor.

"Sec. 6. Work to erect or lay telegraph or telephone wires, to construct street railroads, to lay gas pipes for the purpose of carrying gas for heat and power, along or upon any public street or highway, or to exercise any privilege whatever, a franchise for which shall have been granted in accordance with the terms of this act, shall be commenced in good faith within not more than four months from the granting of any such franchise, and if not so commenced within such time said franchise so

granted shall be declared forfeited, and shall be completed within not more than three years thereafter, and if not so completed within said time said franchise so granted shall be forfeited; provided, that for good cause shown the governing or legislative body may by resolution extend the time for completion thereof, not exceeding three months.

"Sec. 7. The grantee of every franchise or privilege granted under this act shall file a bond running to said city and county, city or town, with at least two good and sufficient sureties to be approved by such governing body, in a penal sum by it to be prescribed and set forth in the advertisement for bids, conditioned that such bidder shall well and truly observe, fulfill, and perform each and every term and condition of such franchise, and that in case of any breach of condition of such bond, the whole amount of the penal sum therein named shall be taken and deemed to be liquidated damages, and shall be recoverable from the principal and sureties on said bond. Said bond shall be filed with such governing body within five days after such franchise is awarded, and in case said bond shall not be so filed, the award of such franchise shall be set aside, and the same may be granted to the next lowest bidder, or again offered for sale, in the discretion of said governing body.

"Sec. 8. It shall be the duty of the attorney general, upon the complaint of any municipality, or, in his discretion, upon the complaint of any taxpayer, to sue for the forfeiture of any franchise granted under the terms of this act, for the noncompliance with any condition thereof.

"Sec. 9. No clause or condition of any kind shall be inserted in any franchise or grant offered or sold under the terms of this act, which shall directly or indirectly restrict free and open competition in bidding therefor, and no clause or provision shall be inserted in any franchise offered for sale, which shall in any wise favor one person, firm or

corporation, as against another, in bidding for the purchase thereof.

"Sec. 10. Any member of any common council or other governing or legislative body of any city and county, city or town of this state, who, by his vote, violates or attempts to violate the provisions of this act, or any of them, shall be guilty of a misdemeanor, and may be punished therefor, as provided by law, and may be deprived of his office by a decree of a court of competent jurisdiction, after trial and conviction."

Section 31 of the city charter, now, and since the adoption of said charter in 1889, in force, is as follows:

"Sec. 31. The council shall have power, by ordinance, to regulate and provide for lighting of streets, laying down gas pipes and the erection of lamp posts, electric towers and other apparatus, and to regulate the sale and use of gas and electric light, and fix and determine the price of gas and electric light, and the rent of gas meters within the city, and to regulate the inspection thereof, *and to regulate telephone service, and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service and connections* (our italics), and to prohibit or regulate the erection of poles for telegraph, telephone or electric wire in the public grounds, streets or alleys, and the placing of wire thereon; and to require the removal from the public grounds, streets or alleys of any or all such poles, and the removal and placing underground of any or all telegraph, telephone or electric wires."

## POINTS AND AUTHORITIES.

We here set forth the opinion of the Circuit Court, under appropriate headings to each proposition discussed by the court.

In passing upon the points raised by the demurrer as to the jurisdiction of the court and in grouping the questions involved in the case, the court below said:

### OPINION OF THE CIRCUIT COURT.

Plaintiff cites numerous authorities showing this to be a case of equitable and also of federal cognizance. Defendants, however, have not suggested any lack of jurisdiction in either respect, nor is there any ground for such contention. No further reference, therefore, will be made to plaintiff's authorities on this point.

The questions about which the parties are at issue may be conveniently grouped under three general heads, as follows:

First.—Did the laws of the state of California, at the time of the passage of the ordinance attached to the bill as Exhibits C and D, and here sought to be annulled, the former requiring telephone companies to report to the city council their receipts, expenditures and value of plant, and the latter fixing the rates to be charged by plaintiff for telephone service, confer upon the city of Los Angeles power to regulate charges for such service?

Second.—Was such power, if the city possesses it, bargained away by the ordinance No. 6959, Exhibit B to the bill, which granted to M. A. King, plaintiff's as-

signor, the franchise under which plaintiff is now operating?

This question is included in the next one, and a strictly logical arrangement would require its assignment there, but, on account of its importance, indeed pivotal character, I have given it a separate heading.

Third.—Do said ordinances Exhibits C and D, contravene that clause of Sec. 10, Art. 1 of the Constitution of the United States, which forbids any state to pass a law impairing the obligations of contracts, or those provisions of the Fourteenth Amendment to said Constitution, which forbid a state to deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws?

These questions will be considered in the order in which they are propounded, and references hereafter to the ordinance attached to the bill will be by the letters which distinguish them respectively as exhibits.

I.

**The state has power to regulate charges for telephone service, and this power may be delegated to municipalities.**

That a state has power to regulate charges for telephone service, is well settled, (Munn v. Illinois, 94 U. S. 113; Chicago, etc., T. R. Co. v. Iowa, 92 U. S. 155; Spring Valley W. Co. v. Shottler, 110 U. S. 347; R. R. Commission Cases, 116 U. S. 307; Rudd v. New York, 143 U. S. 517; Hockett v. State, 105, Ind. 259; Knoxville v. Knoxville W. Co., 107 Tenn. 650); and

it is equally well settled that this power may be delegated to municipalities. (Des Moines Gas Co. v. Des Moines, 44 Iowa 105; People v. Suburban R. R. Co., 178 Ill. 594; St. Louis v. The Bell Telephone Co., 96 Mo. 623; McQuillan on Municipal Ordinances, Sec. 583; Danville v. Danville Water Co., 180 Ill. 233.)

The remaining question for determination here is this: Was said power, at the times of the adoption of said ordinances, vested in the city of Los Angeles, by delegation from the state of California? Section 31 of the charter of said city, then and now in force, is as follows:

> "Sec. 31. The council shall have power, by ordinance, to regulate and provide for lighting of streets, laying down gas pipes and erection of lamp posts, electric towers and other apparatus, and to regulate the sale and use of gas and electric light, and fix and determine the price of gas and electric light, and the rent of gas meters within the city, and regulate the inspection thereof, and to regulate telephone service, and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service, and connections; and to prohibit or regulate the erection of poles for telegraph, telephone or electric wires in the public grounds, streets or alleys, and the placing of wires thereon; and to require the removal from the public grounds, streets or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone or electric wires."

Plaintiff's contention, that the power conferred is only a power to fix and determine charges once for all, that is, permanently, by contract, cannot be sustained.

Certainly no such limitation is expressed, nor can it be reasonably inferred. The words themselves, "fix and determine," when applied to rates, fairly import a continuing power of regulation. (Atlantic & Pacific R. R. Co. v. U. S., 76 Fed. 186.)

The terms "by ordinance" in said section are hardly appropriate to denote a contractual method for the exercise of the power they qualify, but do suitably designate power of a legislative character. This view is strengthened by section 12 of article III of the city charter, which provides, that

> "All legislative power of the city is vested in the council, subject to the power of veto and approval by the mayor, as hereafter given, and shall be exercised by ordinance; other action of the council may be by order upon motion."

If, however, the language of section 31 were ambiguous, the doubt should be resolved in favor of that construction which makes the power a continuous one. This precise question was authoritatively decided in the case next below cited, and a precedent more directly in point is rarely found. There the phraseology of the statute under construction was, that the city council shall have power "to authorize any person or private corporation to construct and maintain the same" (water works) "at such rates as may be fixed by ordinance and for a period of not exceeding thirty years." The opinion in the case quotes a previous construction by the Supreme Court of Illinois, that "the meaning of this language is not that the water works are to be maintained

at such established rate as may be fixed by one ordinance for a period not exceeding thirty years. The clause 'for a period not exceeding thirty years' qualifies the words 'construct and maintain the same' but does not qualify the words 'at such rate as may be fixed by ordinance,' " and then proceeds as follows:

> "The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public the court applied the rule declared in many cases. We said in the Railroad Commission Cases, 116 U. S. 307, 325, by Chief Justice Waite, of the power of the regulation of rates:
>
> " 'This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in Providence Bank v. Billings, 4 Pet. 814, 561, "Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon does not appear." This rule is elementary, and the cases in our reports where it has been considered and applied are numerous.'
>
> "These remarks are obviously applicable to the Illinois statutes. The question is whether the power given to the municipalities of the state was to be continuing or occasional, indeed only special in its purpose, intended to have but one exercise and then bound in contract for thirty years. If the latter had been the intention it would have been natural to express it. The fullness of sovereignty can be taken for granted, and naturally would be and should be taken for granted. An example is afforded by the act of June 6, 1891. By that act the corporate authorities of any city which have authorized or shall authorize any individual, company

or corporation to supply water, 'be and hereby are empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company or corporation. * * *' There is no explicit provision for repetitions of the power—none declaring the power conferred a continuing one. Who now doubts that it is? If rights were claimed and were pleading for a different interpretation we might have to listen to them, but now undisturbed by them we yield without resistance to that meaning which the subject-matter demands in the absence of negativing words.

"Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain waterworks 'at such rates as may be fixed by ordinance, and for a period not exceeding thirty years.' The words 'fixed by ordinance,' may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted, which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time." (Freeport Water Co. v. Freeport, 180 U. S. 599.)

The various reasons, which plaintiff urges in detail against the applicability of said case to the one at bar are not convincing, while the claim, quoting from plaintiff's brief, "that the Freeport case has been virtually overruled by the Supreme Court in the Detroit street car case, and the Cleveland street car case both of which cases were unanimously decided by the Supreme Court

after the Freeport case," is certainly untenable, in view of the fact, that the opinion in the Detroit case, which was written by Justice Peckham, one of the dissenting justices in the Freeport case, cites approvingly the Freeport case (Detroit v. Detroit Cit. St. Ry. Co., 184 U. S. 368-382), and the opinion in the Cleveland case, which was written by Justice White, who wrote the dissenting opinion in the Freeport case, cites approvingly the Detroit case (Cleveland v. Cleveland C. Ry. Co., 194 U. S. 517-536). The opinions in the Detroit and Cleveland cases show, that the Supreme Court had before it in each case the Freeport decision, and yet neither of the two last mentioned justices expressed any continuing dissent from the Freeport case, but on the contrary Justice Peckham refers to said case with seeming approval.

So also plaintiff's contention, that the Broughton Act contemplates the fixing of rates only by contract for the whole term of the franchise, directly conflicts with the rule and authority above enunciated and cited, and is, therefore, without merit.

Plaintiff's argument, that such regulation, as an exercise of legislative power, cannot be a municipal affair, because it works unlawful discrimination between competing corporations, and violates subdivision XIX of section 25, article LV, and section 21 of article I of the state Constitution, and, that equal protection of the law as to rates can be had only when by general statutes they are made uniform throughout the state, is not well grounded. The local conditions of public utilities, such as value of plant, costs of maintenance and operation,

etc., are so variant in different places, that rates, if reasonable, cannot be the same in all localities. From this consideration, it follows, that municipalities should be allowed respectively to fix rates within their corporate limits, and it was to promote and apply this salutary doctrine to all matters of local concern, that the provisions of Sec. 8, Art. XI of the Constitution, authorizing freeholders' charters were ordained as organic laws. Uniformity is the very thing those charters are designed to avoid, and dissimilarity their essential idea.

The Supreme Court of California on this subject has said:

> "It may be true, that the freeholder charter scheme confers greater influence in legislative matters upon the inhabitants of the favored cities than is enjoyed by the people who do not reside in said cities. The inhabitants of the favored cities may participate in making laws for others which have no operations at all as to them, while the outsider, when the charter has been once made has no voice in making such laws for those within the city even when he is vitally and directly interested in them; but if this be an inequality the people have themselves made it and if a remedy is needed they alone can provide it." (People v. Williamson, 135 Cal. 115.)

Nor is there anything contrary to these views in Sec. 6, Art. XI of the Constitution, for the simple reason, that the regulation of the charges of a public service corporation within the limits of a city, is a "municipal affair." Streets of a city are public highways, in which the people of the whole state are interested, yet the opening and

widening of streets are "municipal affairs." (Beyre v. Drain, 127 Cal. 663.) The regulation of telephone rates in a city would seem to be more nearly a matter of local concern than the control of streets. On this point, plaintiff continues as follows:

> "Our construction is reinforced by the consideration of other provisions of the same instrument. Sec. 33 of Art. IV of the Constitution provides: 'The legislature shall pass laws for the regulation and limitation of the charges for services performed and accommodation furnished by telegraph companies * * * and where laws shall provide for the selection of any person or officer to regulate or limit such rates, no such person or officer shall be selected by any corporation or individual interested in the business to be regulated, and no person shall be selected who is an officer or stockholder in any such corporation.' It is plain that by this provision it was not intended to regulate or limit the charges of telegraph companies except by general laws. State v. Mayor, 85 P. R. 744."

Plaintiff, through inadvertence, erroneously quotes the first clause of said section, which is as follows:

> "The legislature shall pass laws for the regulation and limitation of the charges for services performed and conditions furnished by telegraph and gas corporation," etc.

The omitted words "and gas corporations" are very significant. If plaintiff's interpretation of the constitutional provision above quoted be correct, then gas corporations cannot be regulated or limited in their charges except by general laws, whereas plaintiff shows, that by section 19 of article II the fixing of gas rates is a municipal affair. Moreover, if there were no such con-

stitutional provisions in reference to gas companies, it is manifest, that the fixing of gas rates throughout the various cities of the state by a general law would be impracticable, and, that it is a matter properly, if not necessarily, confided to the respective municipalities.

Plaintiff repeats its erroneous construction of said section as follows:

> "Referring again to section 33 of article IV of the Constitution of California above quoted, we desire to call the attention of the court to the fact that that section applies to telephone companies. The section refers only to telegraph companies, but telegraph companies and telephone companies stand upon the same footing, and the language used in constitutions and statutes referring to telegraph companies applies to and binds telephone companies. Joyce on Electric Law, Sec. 8; David v. Pacific States Telephone Company, 127 Cal. 315. The foregoing California decisions on the subject necessarily settles the construction of the above section of the Constitution. It is plain, therefore, that the framers of the Constitution regarded the regulation of telephone and telegraph charges as not a municipal affair, but provided that the same should be done by general and uniform laws, and evidently contemplated that it should be done by some sort of a commission. It is plain that the fixing of telephone rates cannot be a municipal affair, while the above provision of the Constitution of the state of California is in force. It clearly and distinctly requires the legislature to pass the laws, and we think it would be a violation of the plain provision of that section of the Constitution for the legislature to divest itself of this power by delegating it to a municipal corporation."

No one will claim, that it was ever contemplated by the Constitution, that gas rates should be regulated by a general law, or through the agency of a commission, and the truth is section 33 of article LV above quoted does not contemplate the accomplishment of its powers by a general law, or through commissions, but by suitable delegations of power to municipalities. I am clearly of opinion, that the city of Los Angeles, when said ordinances were adopted, was authorized by its charter and the Constitution of the state to regulate charges for telephone service, and, that the authority thus conferred upon the city was as ample as that possessed by the legislature, and, that this conclusion results, even though the grant of said authority be considered solely as a delegation from the legislature. There are strong reasons, however, for a broader and more liberal construction of a freeholders' charter than is usually given to a grant solely from the legislature. The Supreme Court of the state has said:

> "The power of cities under charters to raise money by taxation for municipal purposes does not find its source in any grant by the legislature, but has been directly granted by the people of the state by the provisions of the Constitution." *Ex-parte* F. W. Braun, 141 Cal. 204; Security Savings, Etc., Co. v. Hinton, 97 Cal. 214; *Ex-Parte* Pfahler, 88 Pac. Rep. 270; St. Louis v. Dorr, 145 Mo. 466; St. Louis v. Western U. Tel. Co. 149 U. S. 467.

The power acquired by a municipality under a freeholders' charter, so far as concerns its interpretation, is not unlike that conferred by section 11 of article XI

of the state of California upon municipal corporations to pass local police and sanitary regulations, and it has been repeatedly held, that, in the latter case, the power is a direct grant from the people and not merely an authority delegated by the legislature. (*Ex-Parte* Roche, 104 Cal. 272; *Ex-Parte* Lacey, 108 Cal. 326; Denninger v. Recorder's Court, 145 Cal. 626; Odd Fellows Cam. Ass'n v. S. F., 148 Cal. 226.) Such a charter being an organic act, and so declared by the Constitution, should not the powers of the city thereunder, like those of the legislature of the state, be liberally interpreted? It is unnecessary, however, to pursue this line of thought further. Section 31 of the charter of the city of Los Angeles is so clear and unambiguous in conferring upon said city control of telephone rates, that there is no occasion to invoke collateral aids to interpretation (McPherson v. Blacker, 146 U. S. 27), and, therefore, it is immaterial whether said charter be considered a grant by the legislature or direct emanation from the people.

I am further of opinion, that ordinance C, requiring telephone companies to report to the city council value of plant, receipts and expenditures, is an appropriate, if not necessary means for carrying into effect the power of regulation conferred by section 31 of the charter, and, therefore, power to pass said ordinance is included in said power of regulation.

Plaintiff's claim, that the power of regulation, if conferred, was given to the council as a commission representing the state, independent of the city, and, that the council, as a commission, being without legislative pow-

er, could not lawfully pass ordinance C, is untenable. Careful reading of all the sections of article III of the city charter satisfies me, that the power to regulate rates conferred by section 31 of said article is given to the council not as a commission but as the legislative or governing body of the city. For instance, article III of the charter begins with the declaration, in section 12, "The legislative power of the city is vested in the council, subject to the power of veto and approval by the mayor as hereafter given and shall be exercised by ordinance; other action of the council may be by order upon motion." Then, following in its order, is the provision in section 31 of said article authorizing the council to regulate rates as follows: "The council shall have power by ordinance * * * to fix and determine charges for telephones and telephone service," etc. Reading these sections together, it seems to me, that there is no room for controversy, but that the powers conferred by section 31 were given to the council as the legislative or governing body of the city, and not as a commission. This view is not only shown, however, by a careful perusal and comparison of the various sections of said article of the charter, but is confirmed by the authority which plaintiff itself cites to the opposite contention, namely, Jacobs v. Supervisors, 100 Cal. 121-130 At the latter page, the court says:

> "At the time the section was adopted there was no city and county or city or town other than the city and county of San Francisco, of which a board of supervisors was the legislative department; and it may well be presumed that the constitutional con-

vention, at that time, had particularly in view the city and county of San Francisco when they expressly granted to the board of supervisors the power to establish water rates. But as there were some, and might in the future be other, cities and towns of whose government boards of supervisors did and might not constitute as part, and as other consolidated city and county governments could be established in the future whose legislative department might or might not be boards of supervisors, it was necessary, also, to provide for the fixing of water rates in those kinds of municipalities. And so the section, after declaring that water rates 'shall be fixed annually by the board of supervisors' (that is, of course, when such board was or should be a part of the government), proceeded to provide, also, that in municipalities having boards of supervisors, the 'other governing body' thereof should fix the rates. It is difficult to conceive how any other construction can be put upon the section without entirely eliminating therefrom the prominent and conspicuous words 'board of supervisors.' "

It follows, from the foregoing views, that ordinances C and D are both valid, unless the power of regulation conferred by the local laws upon the city had been previously surrendered by contract or is in contravention of some provision of the Federal Constitution, and these two questions will be considered in the order in which they have been named.

II.

**The City of Los Angeles did not by franchise ordinance "Exhibit B" surrender or suspend its power to regulate appellant's charges for telephone service.**

I now come to the second question propounded in the outset of this opinion, namely, did the city of Los

Angeles, by ordinance B, surrender or suspend its power to regulate plaintiff's charges for telephone service?

The power to abandon or suspend its control of rates is not expressly given the city of Los Angeles either by its charter or the Broughton Act (Stats. of California, 1901, page 267.) It is argued, however, by plaintiff, that, in this age, telephone systems are among the appropriate instrumentalities for providing and maintaining suitable fire and police departments, and otherwise promoting the efficient administration of municipal government, and, therefore, the power to contract for telephone rates is inferable from sections 17, 22 and 23 of said charter. It is also argued on behalf of plaintiff, that this power to contract for rates is to be implied from the Broughton Act, providing for the sale of franchises, on the ground, that a sale implies a price. It may well be doubted, however, whether or not authority to provide and maintain suitable fire and police departments, or the more comprehensive authority to efficiently administer the municipal government, as conferred by the city charter, or whether or not the sale of franchises as authorized and provided for by the Broughton Act, necessarily or reasonably include authority to surrender municipal control over rates. These provisions of the charter and the Broughton Act are unlike the charter provisions in Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720, from which the court inferred power to fix rates contractually. There the express provision of the charter was, that the city council "shall have the

power * * * to provide for supplying the city with water."

It may be, that whatever doubts arise on this question should, under the well recognized rule of construction hereinbefore referred to, be resolved against the claimed grant of power and favorably to its retention by the state. However, if for the purposes of this hearing, it will be conceded, without further consideration or any decision of the question, that the city, when plaintiff's franchise was granted, had authority by contract to abridge or abandon its control of telephone rates, and it is, therefore, needless to enquire whether, in granting said franchise, it acted in a proprietary or legislative capacity, or derived its authority from charter provisions or general laws. It is important, however, to determine the character of the power to regulate rates, since this fixes the rule of construction applicable to cases where abandonment or suspension of the power is claimed.

The power of the state to regulate public utilities, including rates, cannot be otherwise than a power of legislation. Where this power has been admittedly conferred upon a city, and the city adopts a suitable ordinance, in execution of this power, such an ordinance is not in any sense a proprietary matter. I can see merit, if not convincing force, in the proposition, that a city, when it enters into a contract for a public utility, even though municipal control of rates be thereby abridged or abandoned, acts in a proprietary character, but this proposition by no means takes away from the power thus aban-

doned its governmental or legislative character. This distinction seems to be presented in the following quotation:

> "The power to fix and to regulate the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation, and other public utilities partakes of the nature of a governmental power and also that of a business power. Are the inhabitants of a city paying rates not fixed by contract to *quasi-public* corporations for public utilities? The power to so regulate these rates that they shall not be unreasonable is a legislative, a governmental power which the state or city may exercise, but may not renounce. Is a city without waterworks and hence without rates at which anyone will furnish water therefrom to the municipality or its inhabitants. The making of a contract for the construction and operation of waterworks therein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years is the exercise of one of the business powers of the corporation. The purpose of such a contract is not to regulate rates, for there are no rates to regulate. Hence it is that the legislature of a state, unless prohibited by its constitution, may empower a city to suspend by contract, and a city may suspend in that way during a reasonable term of years, its power to change or regulate the rates which an individual or corporation may collect of private consumers." Omaha Water Co. v. Omaha, 147 Fed. 1, 5.

In a leading case on this subject it is said:

> "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of

Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private. Thorpe v. R. & B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas.* From this source come the police powers, which, as said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty * * * that is to say * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the states upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." Munn v. Illinois, 94 U. S. 124.

In another case a specific designation is made as follows:

"This power of regulation is a power of govern-

ment continuing in its nature and if it can be bargained away at all it can only be by words of positive grant or something which is in law equivalent." Railroad Commission Cases, 116 U. S. 325.

In yet another case it is held, quoting from the syllabus:

"An act of the legislature of New York (Laws of 1888, chap. 581) provided that the maximum charge for elevating, weighing and discharging grain should not exceed five-eighths of one cent a bushel; and that, in the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal boats, should only be required to pay the actual cost of trimming or shovelling to the leg of the elevator when unloading, and trimming cargo when loading; held, that the act was a legitimate exercise of the police power of the state over a business affected with a public interest, and did not violate the Constitution of the United States and was valid." Budd v. New York, 143 U. S. 517.

At page 534 of the same case, appears the following:

"The opinion further said that the criticism to which the case of Munn v. Illinois had been subjected proceeded mainly upon a limited and strict construction and definition of the police power; that there was little reason, under our system of government, for placing a close and narrow interpretation on the police power, or restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society and the new circumstances as they arise calling for legislative intervention in the public interest; and that no serious invasion of constitutional guarantees by the legislature could withstand for a long time the

searching influence of public opinion, which was sure to come sooner or later to the side of law, order and justice, however it might have been swayed for a time by passion, prejudice, or whatever aberrations might have marked its course. We regard these views which we have referred to as announced by the Court of Appeals of New York, so far as they support the validity of the statute in question, as sound and just."

In a still later case, the Supreme Court, referring to the matter of rates, said:

> "These acts are urged to establish the power in the village of Rogers Park to grant to the plaintiff in error the right to charge and collect for thirty years the rates prescribed by the ordinance of November, 1888. * * * A strict construction must be exercised. The contract claimed concerned governmental functions, and such franchise cannot be held to have been stipulated away by doubtful or ambiguous provisions." Rogers Park Water Co. v. Fergus, 180 U. S. 624-629.

From the foregoing excerpts, it is manifest, that the Supreme Court classifies the power to regulate rates as governmental and falling within the police powers of the state. Nor does Los Angeles City Water Co. v. Los Angeles, 88 Fed. 721, hold anything to the contrary, but after quoting from a line of decisions which treat the power in question as proprietary, the court there says:

> "If, however, it be conceded, contrary to these authorities, and as claimed by defendants, that the power of the city to regulate water rates is legislative or governmental, the city may by contract abridge such power under an implied as well as an

express legislative grant and this rule is recognized in many of the authorities upon which defendant relies."

In the Los Angeles case there was no dispute but that the city had entered into a contract which limited its power to regulate rates, and the court held, that, conceding this power to be legislative, still it was competent for the city to bargain it away. Plaintiff's syllogism, substantially as follows: Police power cannot be bartered away: power to regulate rates may be surrendered by contract: therefore, power to regulate rates is not a police power; is manifestly unsound in its first premise. It has been authoritatively and repeatedly held, that powers of sovereignty may be contractually abandoned. In the earliest case on this subject it is clearly implied, that even the sovereign power of taxation may be thus surrendered, the court saying:

> "That the taxing power is of vital importance; that it is essential to the existence of the government; are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem, that the relinquishment of such a power is never to be presumed. We will not say, that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it, may not exist; but as the whole community is interested in retaining it undiminished; that community has a right to insist, that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." Providence Bank v. Billings, 29 U. S. 514, 560.

So, too, the police power of the state may be surrendered or abridged by contract, if the contract be not prejudicial to the peace, good order, health or morals of its inhabitants. This qualification is stated by a case cited by plaintiff as follows:

> "The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself, nor its successors, to contracts prejudicial to the peace, good order, health or morals of its inhabitants; but it is to cases of this class that these rulings have been confined." Walla Walla v. Walla Walla Water Co., 172 U. S. 1-155.

The police powers, however, include other subjects than those enumerated, and, as said in Munn v. Illinois, *supra:*

> "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, bakers, millers, wharfingers, innkeepers, etc., and in so doing, to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold."

The Walla Walla case above referred to, so far from holding that regulation of rates is not a police power,

holds, that, where a contract is itself innocuous, it may be sustained, even though it abridges the police power. Thus, at page 16, the court says:

> "Under this power and the analogous power of taxation we should have no doubt that the city council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, the payment of its just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which the pipes and mains of the company should be laid through the streets of the city. New York v. Squire, 145 U. S. 175; St. Louis v. Western Union Tel. Co., 148 U. S. 92; Laclede Gas Light Co. v. Murphy, 170 U. S. 78. But where a contract for a supply of water is innocuous in itself and carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

The same distinction is recognized in another quotation at page 24 of plaintiff's brief, as follows:

> "I may add that a law for the purpose of securing and enforcing fair and reasonable charges by common carriers is not to be classed with those laws making for the public health and public morals, the power to enact which cannot be contracted away or parted with by the state." Central Trust Co. v. Citizens Street Ry. Co., 82 Fed. 1-8.

I am clearly of opinion, both upon reason and authority, that control of rates is distinctly a police power of the state; indeed the decisions of the Supreme Court are conclusive of the question. Such being the character of the power, the rule of construction applicable to cases

where parties claim its abandonment or suspension is easily ascertained. The Supreme Court has said:

> "This power of regulation is a power of government continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in the case of Providence Bank v. Billings, 4 Pet. 514-561, 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been considered and applied are numerous." Stone v. Farmers' Loan & T. Co., 116 U. S. 307.

Again, it has been said:

> "Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and, unless an exemption is clearly established, the legislature is free to act on all subjects within its general jurisdiction, as the public interests may seem to require. As was said by Chief Justice Taney, speaking for the court, in Charles River Bridge v. Warren Bridge, 11 Pet. 547: 'It can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created.' This is an elementary principle." Ruggles v. Illinois, 108 U. S. 526.

See also Freeport Water Co. v. Freeport, 180 U. S. 587; Danville Water Co. v. Danville, 180 U. S. 619; Rogers Park Water Co. v. Fergus, 180 U. S. 624; Atlantic & Pacific R. R. Co. v. U. S., 76 Fed. 186.

Bearing in mind the rule of construction applicable to contracts which are claimed to abandon or suspend governmental control of rates, let us now examine ordinance B, granting to plaintiff's assignor its franchise. The ordinance is entitled as follows:

> "An ordinance granting to M. A. King and his assigns the right for a period of fifty years, to construct, maintain and operate conduits and wires, etc., for the purpose of transmitting sound, signals, conversation and intelligence by means of electricity and carrying on a general telephone business, together with certain appurtenant and incident rights."

The ordinance then proceeds as follows:

> "Section 1. That the right, privilege and franchise is hereby granted to M. A. King and his assigns, to construct, lay down, maintain and operate for the period of fifty years an underground conduit and wires. * * *
>
> "And to transmit sound, signals, conversation and intelligence through and over said wires by means of electricity, together with the right to construct, operate and maintain all necessary feeders, service wires, house connections and such other apparatus and appliances in connection therewith as may be necessary for the purpose of safely and efficiently operating and maintaining said conduit, poles and wires, and carrying on a general telephone business by means thereof. * * *"

Section 9 of the ordinance provides, among other things:

> "That the rent or charge for unlimited, independent, metallic circuit, telephone service in the system established or maintained under said franchise so long as said system does not connect and ex-

> change with more than 10,000 telephones, shall not exceed $60.00 per annum for a telephone installed in any business office or premises, or $30.00 per annum for a telephone installed in a private residence, and that when said system shall comprise more than 10,000 telephones, the annual rental or charge for the aforesaid services shall not be increased by more than a sum equal to $6.00 per annum for each one thousand telephones in said city connected with said telephone system in excess of 10,000."

Is it true that, by the provisions of said section of said ordinance, the city of Los Angeles abandoned, for fifty years, its right to reasonably limit plaintiff's charges for telephone service? Can it be said, that the abandonment of the power in question has been "shown by clear and unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power?" Certainly, there is no express abandonment, and the circumstances of this case, particularly the long period of fifty years, forbid an implication of that sort. I do not mean to assert, that, if a contract unequivocally abandoned a legislative power for fifty years, the duration of the abandonment would itself avoid the contract, but what I do say is, that such a long period is a strong, if not conclusive reason why an abandonment should not be implied

The Supreme Court of Illinois, in a case very similar to this one, said:

> "The village exercised the power by incorporating in the ordinance a scale of prices as being just and reasonable maximum rates to be paid to the com-

pany by the consumer of water. This provision of the ordinance had no effect to establish a contract between the appellant company and the village that the individual inhabitants should and would pay such rates for the period of thirty years, or any fixed period of time, but was simply a declaration on the part of the village that such rates were reasonable. The legal effect was to establish, *prima facie,* the corporation, in order to discharge the duty it owed to the public, must supply the commodity it had been created to supply at the prices named in the ordinance. It was a mode of regulating and enforcing the discharge of a legal duty—not a proposition looking toward a contract. No contract was necessary to create an obligation on the part of the corporation to supply water at a reasonable rate, for that rested upon it as a duty. Nor did the fixing of rates by the alleged ordinance of the village of Rogers Park vest in the appellant company an irrevocable right to exact such rates for the period it had been granted permission to occupy the streets, alleys and public places of the village, or for any fixed period. A rate or price reasonable and just when fixed may, in the future, become so unreasonably high that the exaction of such rate or price is but an extortion. The duty of the corporation does not, however, change, but remains the same,—that is, to exact only reasonable compensation. The power of the state to enforce that duty is not exhausted by its exercise in the first or any subsequent instance, but is continuous, and may be exerted from time to time, whenever necessary to prevent extortion by the agency created by the state to serve the public." Rogers Park Water Co. v. Fergus, 178 Ill. 571-578.

Furthermore, section 9 of ordinance B, is not a grant, but a limitation. The franchise granted in the first section to construct a telephone system and carry on a

general telephone business necessarily implies a right to charge reasonable rates for telephone service (Winona, etc., Co. v. Blake, 94 U. S. 180), and section 9 is but a limitation upon this right. It confers nothing, but simply qualifies what has already been conferred. It does not give any right whatever to the plaintiff, much less a right to charge up to the maximum rate, for fifty years, but is simply a legislative declaration that any charge in excess thereof would at that time be unreasonable. This distinction and its consequences are amplified in Atlantic & Pacific R. R. Co. v. United States, *supra*, and, after careful consideration of the opinion in that case, which was written by myself, I am satisfied with the principles it enunciates, and their application to the case at bar can but lead to the conclusion, that section 9 of ordinance B is not, nor was it intended as a covenant surrendering the city's control of rates.

Plaintiff states its opposing contention, in general terms, thus: "A franchise which has fixed maximum rates for the services to be rendered thereunder is a contract as to the rate, and the rate cannot be reduced." I shall not undertake a full review of the cases cited by plaintiff to this contention, but will briefly notice some of them.

Stone v. Yazoo & Mississippi R. R. Co., 62 Miss. 607, does not sustain the contention, as appears from the first clause of plaintiff's quotation from the case, which is as follows:

> "Section 5 of the charter of the appellee confers on the company power to fix from time to time, by its board of directors, the rates at which it will

transport person or property over its railroad, provided they shall not exceed the maximum specified in the Act."

Thus it will be seen, that the right of the company to fix its rates was not an implication from the maximum rate prescribed, but was expressly conferred.

State v. Laclede Gas Co., 102 Mo. 472, although somewhat different in its facts from the case at bar, seems to favor plaintiff's contention. Pingree v. Michigan Central Ry. Co., 76 N. W. 635, was also decided upon its own peculiar facts, many of which do not exist in the case at bar. The opinion is a long one, and in order to be properly understood, must be carefully read. Two excerpts from the opinion, however, will clearly show, that the mere fixing of a maximum rate does not give a right to charge up to that rate, but such right can exist only where there are other expressions or circumstances, in connection with the maximum rate, showing unequivocally an intent to confer such right. At page 640 the court says:

"It was not then, a general grant of power, and therefore limited to fixing rates the reasonableness of which should be determined by the usual methods, and consequently the same power as any individual or corporation would have without it, but was intended to confer a contract right to fix tolls, within the limit of three cents a mile, as plainly as though it had provided that said road should have the right to charge three cents a mile, or less, in its discretion, for transportation of passengers. It will be noticed in the cases cited that in no case where a maximum rate was fixed has the right of the company to fix tolls to that amount been denied. This

case is even stronger than such, inasmuch as the charter expressly fixes the limitation, and unqualifiedly states that such shall be the only limitation of the company's power."

Again, at page 642, the court says:

"It is noticeable that in the present case we do not 'find the section granting the power to fix rates by by-law in the same section that declares that by-laws shall not be in conflict with the laws of the state,' nor do we find a mere general authority to fix rates, nor a mere mention of a maximum rate."

It should be observed here, however, that the statement of the court in said quotation, "it will be noticed in the cases cited that in no case where a maximum rate was fixed has the right of the company to fix toll in that amount been denied," is manifestly erroneous, because maximum rates were prescribed and the right of the company to fix tolls to that amount was denied in Banking Company v. Smith, 128 U. S. 174.

Burough v. Whitehaven W. Co., 58 Atlantic 159, so far from supporting plaintiff's contention, treats the maximum rate prescribed as a limitation upon, not the grant of a right, and is in perfect accord with the views I have expressed.

Chicago R. R. Co. v. Iowa, 94 U. S. 155, affords no support to plaintiff's contention. The full paragraph from which plaintiff quotes is as follows:

"This company, in the transaction of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the car-

> riage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon the corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that has been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of the legislators for protection against wrong under the form of legislative regulation."

All that the court decides in this paragraph is, that, if the legislature had fixed "permanently" a maximum limit in the charter, it might have been a contract against future legislative interference; indeed, the language of the court implies, that the mere fixing of a maximum limit is not a provision against future legislative control, but, that, in order to effect this result, the maximum limit must be prescribed permanently in terms.

In Detroit v. Detroit R. R. Co., 60 Fed. 161, the only pertinent fact is found at page 171, as follows:

> "By section 8 of the ordinance of 1862, it was provided 'the rate of fare for any distance shall not exceed 5 cents on any one car or on any one named in this ordinance.' "

Whether this section should be construed as a grant, which was the final conclusion of the court, or a limitation, which was the court's first impression, depends largely upon other facts of the case, which do not appear, and I am, therefore, unable to determine its applicability or force here.

City of Indianapolis v. Central Trust Co. of New York, 83 Fed. 529, simply decides, that the plaintiff in good faith claimed a vested contract right to charge a higher rate of fare than that fixed in the ordinance assailed, and, that, therefore, the court had jurisdiction of the case.

Moreover, it is to be inferred from the statement of facts, that the ordinance fixing the maximum was passed pursuant to a statute of the state which gave power to the street railway company "to make by-laws among other things for regulating the running of the cars and the rate of fares on the road." If this inference be correct, then it was the statute which gave the power to the company to fix the rates, while the ordinance which prescribed the maximum was but a limitation on that power.

Detroit v. Detroit Cit. Ry. Co., 184 U. S. 368, is widely and readily distinguishable from the case at bar. The court there held, that the rate provisions gave the company a contractual right to charge up to the maximum, on the ground, that the ordinance was passed under and pursuant to an act of the legislature which expressly directed the parties, that is, the city and the street railway company, to fix rates by agreement. The opin-

ion of the court shows, that the meaning it gave to the language fixing maximum rates was demanded by the peculiar circumstances of the case, and, that the same language, under other circumstances, would call for a different construction. This idea the court emphasizes as follows:

> "It may very well be that language used by the legislature is merely conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them would be regarded as forming a contract, because the statute provided specially for that mode of determining them."

The Supreme Court, in a later case, where the provision as to a maximum rate was, that "said company will supply private consumers with water at a rate not to exceed 5 cents per 100 gallons," said:

> "The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended it was far too important to be left to implication. In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174; Ragan v. Aiken, 9 Lea. 609. They are words of a company which was notified by the act which called it into being of the power expressly conferred upon the city 'by ordinance to regulate the price of water' which the company might supply. People who have accepted, as experience shows

that people will accept, a charter subject to such liabilities cannot complain of them or repudiate them, nor can the company which they have formed. Rockport Water Co. v. Rockport, 161 Massachusetts, 279. This consideration answers a portion of the company's argument as to its rights under the Fourteenth Amendment, and makes it unnecessary whether the regulation of water rates is properly to be classed as a police power. It also reinforces our interpretation of the instrument upon which the company founds its claim. We do not mean that under other circumstances words which on their face only express a limit might not embody a contract more extensive than their literal meaning. Detroit v. Detroit Citizens' Street Ry. Co., 184 U. S. 368. But in that case the rate was fixed by ordinance which was the language of the city, the ordinance was under a statute which declared that the rates should be established by agreement between the city and the railway company, and neither statute nor ordinance reserved a power to the city to alter rates. In the present case it seems to us impossible to suppose that any power to contract which the city may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law under which the water company was created. It would require stronger words than those used here to raise the question whether, under the statutes in force, the city could do it if it tried. The contracts fixing prices authorized by the statute were contracts between the company and its consumers, not, as in the case of the railway company, a single contract between the company and the city, and were subject to the power to regulate them given to the city by the same statute. We assume that the charter of the city authorized it to contract, but it was not so specific as the statute which we have quoted, and added nothing to the power conferred

by that law." Knoxville Water Co. v. Knoxville, 189 U. S. 434-436.

Not only does this last question confirm the views which I have expressed of the Detroit case, but distinguishes it from Georgia Banking Company v. Smith, 128 U. S. 174, which holds, in substance, that the mere fixing of a maximum rate is not a surrender of the power of future regulation. The rate provision in the latter case was as follows:

> "Provided, that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles; and five cents per mile for every passenger."

And the court said:

> "The question then arises whether there is in the 12th section of the charter of the plaintiff in error a contract that it may make any charges within the limits there designated. * * * It does not matter in the present case, whether the term be construed as imposing a condition on the preceding exclusive grant to the company of the privilege of transporting passengers and merchandise over its own roads, or be considered merely as a conjunction to an independent paragraph, declaring a limitation upon the charges which the company may make. If considered as a condition to the enjoyment of the exclusive right designated, then the section only provides that, so long as the maximum of rates specified is not exceeded, the company or its lessee shall have the exclusive right to carry passengers and merchandise over its roads. It contains no stipulation, nor is any implied, as to any future action of the legislature. If the exclusive right remain undis-

turbed, there can be no just ground of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the legislature had, in 1883, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated. It is conceded that a railroad corporation is a private corporation, though its uses are public, and that a contract embodied in terms of its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligations of contracts. If the charter in this way provides that the charges, which the company may make for its services in the transportation of persons and property, shall be subject only to its own control up to the limit designated, exceptions from legislative interference within that limit will be maintained. But to effect this result, the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the state. There is no such language in the present case. The contention of the plaintiff in error therefore fails, and the judgment must be affirmed."

Cleveland v. Cleveland Street Ry. Co., 194 U. S. 517, cannot justly be considered a precedent here, since most of the facts on which the decision turned are absent from the case at bar. For instance, the court there said:

"It is undoubtedly true, that, immediately before and for a long time prior to the passage of the ordinance concerning the various consolidations and extensions referred to, the respective roads affected thereby were charging a cash fare of five cents over

their respective lines, and that the effect of the consolidations and extensions was to secure to the public the benefit of a cash fare of five cents over the whole length of the consolidated and extended lines."

Again, the court says:

"The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated, the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed."

In the case at bar, the power to contract, if it exists at all, is but an implied power, and cannot justly be called a "comprehensive power," such as that described in the above quotation.

In the Cleveland case, it was specifically provided:

"That for a single fare from any point to any point on the line or branches of the consolidated road no greater charge than five cents shall be collected, and that tickets at the rate of eleven for fifty cents or twenty-four for one dollar shall at all times be kept for sale on the cars by conductors."

The clause "and that tickets at the rate of eleven for fifty cents or twenty-four for one dollar shall at all times be kept for sale on the cars by conductors," aids somewhat in giving to the rate provision a contractual character, the words "at all times," signifying the life of the franchise, twenty-five years.

Again, in the Cleveland case, the court further says:

> "The acceptance of this ordinance by the railroad companies affected thereby was required to be in writing and filed with the city."

Again, the court, in that case, said:

> "Like provisions were contained in the ordinance of April 8, 1887, authorizing the laying of an additional track and the extension of the lines of the Woodland Avenue and West Side Street Railroad company, and there was also a declaration, following the authorization of the extension and the rates to be charged on the whole line, that 'The right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908.' The ordinance of August 12, 1887, authorizing a further extension, and the ordinance of June 20, 1892, authorizing the double tracking of a portion of the line, contained similar language."

The clause, "and there was also a declaration, following the authorization of the extension and the rates to be charged on the whole line, that 'The right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908,' " was evidently a circumstance of much weight in the mind of the court, since "the right" which was to terminate on the 10th day of February, 1908, related both to "the authorization of the extension and the rates to be charged on the whole line," that is to say, "the right" granted included the matter of rates as well as the extension of the road. Furthermore, this right was to terminate in a specific time, 25 years, or, differently expressed, was to continue for that period.

None of the foregoing circumstances are found in the case at bar, and not only are they made prominent by the court in stating the material facts of the Cleveland case, but the court, in its summary, presumably to the end, that there might be no mistake or doubt as to the grounds of its decision, and, that it might not thereafter be improperly invoked as a precedent, emphasizes said facts as among the controlling circumstances of the case, in the following unequivocal language:

> "In reason, the conclusion that contracts were engendered, would seem to result from the fact that the provisions as to rates of fare were fixed in ordinance for a stated time and no reservation was made of a right to alter, that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion, that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged. Taking all the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in Detroit v. Detroit Citizens' Street Railway company, 184 U. S. 368, and approvingly referred to in Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437."

The court looked not merely to one or two of said facts, but was careful to say:

**(OPINION OF THE CIRCUIT COURT.)**

> "Taking all the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 368, and approvingly referred to in Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437."

Another difference of great importance between the Cleveland case and the one at bar, is, that, in the Cleveland case, the suspension of the power of regulation was for only 25 years. In the case at bar, the suspension, if held to exist, would be for the period of 50 years. Indeed, this distinction applies to all of the cases cited in this connection except the Freeport case, where the existence of a contract for rates was denied, and it is worthy of note, that plaintiff, in its brief, states, that the period of suspension in the Freeport case, 55 years, was an unreasonable time. It is also worthy of notice, that, in the Cleveland case, the court refers approvingly to the Knoxville case, wherein, as I have already shown, it was held, that the mere fixing of maximum rates did not displace the municipal power of regulation given by the general law, under which the water company was created. Furthermore, there is no provision in section 9 of ordinance B as to when the maximum rates there prescribed shall terminate, or how long they shall last. This becomes more noticeable when we read in the same connection the first clause of section 11 of ordinance B:

> "That the person to whom this franchise is granted, or his assigns, shall, during the life of said franchise pay to the city of Los Angeles in lawful money of the United States two per cent of the

gross annual receipts of such grantee and his assigns, arising from the use, operation or possession of said franchise."

Thus, it will be seen, that section 11 expressly provides, that two per cent of the gross annual receipts of the company shall be paid to the city "during the life of said franchise," whereas the provisions of section 9 as to rates are not fixed, as they were in the Cleveland case, for a stated time.

It is true, that the city by ordinance B required plaintiff to furnish for the use of the city 30 telephones and 150 pairs of conductors and to pay to the city two per cent of its gross annual receipts, and these things were doubtless considered an adequate consideration for the franchise granted plaintiff to use the public streets and alleys for the construction and operation of plaintiff's telephone system, but I find no case which supports plaintiff's contention, that such a consideration alone is sufficient to show, that the city, besides granting the use of the public streets and alleys, intended also to construct as to rates, thus abandoning its control of plaintiff's charges for the unusual period of half a century.

A somewhat elaborate review of the cases, including those above cited, bearing upon the point now under consideration, has been made by the Circuit Court of Appeals of the Eighth circuit in a case wherein the court, on grounds substantially the same as in the case of Detroit v. Detroit Citizens' Ry. Co., *supra*, held, that there was a suspension of the power to regulate rates. Omaha Water Co. v. Omaha, 147 Fed. 1.

After much reflection upon the subject, and a careful review of the authorities, I can but conclude, that the city of Los Angeles did not, by ordinance B, abandon or suspend its power to regulate charges for telephone service.

III.

**The regulating ordinance "Exhibit D" does not contravene any of the provisions of the Constitution of the United States.**

My ruling, just announced, that there was no contract as to rates between the city and the plaintiff, disposes of the latter's contention, that ordinance D violates what is known as the impairment clause of the Constitution.

Plaintiff's kindred contention, that said ordinance violates the Fourteenth Amendment, seems to be rested on the ground, that "equal protection of the laws," within the meaning of said amendment, so far as rates are concerned, is afforded only where the rates are fixed uniformly throughout the state by general laws, and, on the further ground, that ordinance D and E, which prescribe different rates for two companies, operating in said city, unlawfully discriminate against plaintiff, and, that, since ordinance D makes no provision for notice, it would, if executed, deprive plaintiff of property without due process of law.

The first of these grounds has already been considered, the others will now receive attention.

A moment's reflection shows, that the mere fact, that different rates are prescribed for two companies, does not, of itself, establish unlawful discrimination against either. Such discrimination can result from different rates only where the companies are identical as to those factors which determine just compensation, among them being value of plant, revenues and expenditures. (San Diego Water Co. v. San Diego, 118 Cal. 556.) These conditions are rarely, if ever, the same in any two companies, and it is obvious, that a rate fair to one company might be very unfair to another. To obtain relief on said ground, it is not sufficient to allege discrimination in general terms, but the facts out of which the discrimination grows must be clearly and specifically shown.

Moreover, ordinance C, whose validity I have already shown, was intended to place before the city council such information as would enable it to do full justice to the plaintiff in the matter of rates. In paragraph XIV of the bill of complaint, it is expressly alleged, that plaintiff has not complied and declines to comply with said ordinance. Thus it appears, that plaintiff has intentionally refused to do that which the law expressly enjoins, namely, furnish the information required by said ordinance, and for the lack of which the unlawful discrimination, if any, presumably resulted. Plaintiff will not be heard to complain in equity of a condition of things brought about by its own wilful omission of duty.

It should be remembered, in this connection, that the reasonableness or unreasonableness of the rates fixed by ordinance D is not before the court, but the only question

is whether or not the city had power to fix any rates. In order to raise the question of reasonableness, it would be incumbent upon the plaintiff to allege, as I have already indicated, the particular facts on which the claim of unreasonableness rests. Covington, etc., Turnpike Co. v. Sanford, 164 Yus. 578; Atlantic & Pacific R. R. Co. v. U. S. 76 Fed. 186; Redlands, etc., Water Co. v. Redlands, 131 Cal. 365; San Diego Water Co. v. San Diego, 118 Cal. 556. As stated above, however, plaintiff's contention is not, that the rates fixed by the city in ordinance D are so low as to be oppressive, but that the maximum rate fixed in ordinance B is unalterable for a period of fifty years.

The other ground on which plaintiff bases its claim of an infraction of the Fourteenth Amendment, namely, that the ordinance D does not provide for notice, is equally intenable. Said ordinance, being, as I have already held, legislative in character, no notice of intention to pass or consider it was required. Moore v. Haddonfield, 62 N. J. Law 386; Cleveland, C. C. & St. L. R. R. Co. v. St. Bernard, 19 Ohio Circuit Court Rep. 299. On this subject of notice, the Supreme Court of California has said:

> "Whether the fixing of rates by the council be called a legislative, a judicial, or an administrative act, it is certainly not an adversary judicial proceeding, such as, under the Constitution will conclude private rights. It is a proceeding on the part of the government to which neither the water company nor the rate payers are parties, conducted without notice to them, and without any right on their part to effectually intervene." San Diego Water Co. v. San Diego, 118 Cal. 315.

To the same effect is the case of Water Works v. San Francisco, 82 Cal. 286-315.

The Supreme Court of the United States has also declared notice unnecessary, in the following language:

> "Was the appellant entitled to formal notice as to the precise day upon which the water rates would be fixed by ordinance? We think not. The Constitution itself was notice of the fact that ordinances or resolutions fixing rates would be passed annually in the month of February in each year and would take effect on the first day of July thereafter. It was made by statute the duty of the appellee at least thirty days prior to the 15th day of January in each year to obtain from the appellant a detailed statement, showing the names of water rate payers, the amount paid by each during the preceding year, and 'all revenues derived from all sources,' and the 'expenditures made for supplying water during said time.' It was the right and duty of appellant in January of each year to make a detailed statement, under oath, showing every fact necessary to a proper conclusion as to the rates that should be allowed by ordinance Act of March 7, 1881, 2 above cited. Provision was thus made for a hearing in an appropriate way. The defendant's board could not have refused to have duly considered it and given it proper weight in determining rates. If the state by its Constitution or laws had forbidden the city or its board to receive and consider any statement or showing made by the appellant touching the subject of rates, a different question would have arisen. But no such case is now presented. In Kentucky Railroad Tax Cases, 115 U. S. 321, 333, it was said: 'This return made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs

as it may see fit to insert. It is laid by the auditor of public accounts before the board of railroad commissioners, and constitutes the matter on which they are to act. They are required to meet for that purpose on the first day of September of each year at the office of the auditor at the seat of government. * * * These meetings are public and not secret. The time and place for holding them are fixed by law.'" (San Diego Land Co. v. National City, 174 U. S. 739-752.)

A like ruling based expressly upon this San Diego case, was subsequently made in Freeport Water Company v. Freeport, 180 U. S. 587-600.

It should be remembered in this connection, that ordinance C provides, that rates shall be fixed at a regular or special meeting of the city council, held during the month of February of each year, and makes it the duty of every person, firm or corporation supplying telephone service to said city or its inhabitants to furnish to the city council in the month of January of each year written statements under oath of receipts, revenues and expenditures during the year preceding the date of such statement, and also an inventory of all the works, lines, plant and property owned or used by such person, firm or corporation, necessary or convenient to carrying on its business and showing the actual cost and present cash value of each item thereof. These provisions of said ordinance are substantially the same as the provisions of the constitution and statute referred to in the quotation last above made, and bring the case at bar within the principles there enunciated.

The last three decisions, one by the Supreme Court

of California and the other two by the Supreme Court of the United States, are determinative of the question of notice, and it is unnecessary to review in detail the numerous cases from other states referred to in plaintiff's brief. The California cases cited at page 13 of said brief, and that of Fallbrook Irrigation District v. Bradley, 164 U. S. 168, as well as Hagar v. Reclamation District, 111 U. S. 701, and other cases involving special taxes and assessments, are applicable here.

Chicago, etc., Ry. Co. v. Minnesota, 134 U. S. 418, so far from holding that notice is necessary under the facts of the case at bar, impliedly indicates, that such notice is not required. In that case it was held, that notice was necessary largely on the ground, that the statute creating the commission made its action final and conclusive, so that the same could not in any way be reviewed by the courts. In the later case, above mentioned, San Diego Land Co. v. National City, 174 U. S. 739-748, the Supreme Court said:

> "Upon the point just stated we are referred to the decision of this court in Chicago, Milwaukee &c Railway v. Minnesota, 134 U. S. 418, 452, 456, 457. That case involved the constitutionality of a statute of Minnesota empowering a commission to fix the rates of charges by railroad companies for the transportation of property. The Supreme Court of the state held that it was intended by the statute to make the action of the commission final and conclusive as to rates, and that the railroad companies were not at liberty, in any form or at any time, to question them as being illegal or unreasonable. This court said: 'This being the construction of the statute by which we are bound in considering the present case, we are of opinion, that, *so construed,*

it conflicts with the Constitution of the United States in the particulars complained of by the railroad company.' * * * Observe that this court based its interpretation of the statute of Minnesota upon the construction given to it by the Supreme Court of that state. What this court said about the Minnesota statute can have no application to the present case unless it be made to appear that the Constitution and laws of California invest the municipal authorities of that state with power to fix water rates arbitrarily, without investigation, and without permitting the corporations or persons affected thereby to make any showing as to rates to be exacted or to be heard at any time or in any way upon the subject. The contention of appellant is that such is the purpose and necessary effect of the constitution of the state. We are not at liberty so to interpret that instrument." San Diego Land Co. v. National City, 174 U. S. 739-748.

In the case at bar, as held in San Diego Water Co. v. San Diego, *supra*, and San Diego Land Co. v. National City, *supra*, the action of the city council in fixing telephone rates is not final or conclusive, but open to judicial examination as to whether or not the rates so fixed are reasonable. This last case is fully in point, and holds, upon facts substantially similar to those in the case at bar, that notice is unnecessary. The ruling made by me as to the power of the city over telephone rates and the construction of section 9 of ordinance B sufficiently answer plaintiff's contention, as to an estoppel.

My conclusion upon the whole case may be summarized as follows: The charter of the city of Los Angeles, at the time of the passage of the ordinances sought to be annulled, conferred upon said city power to regulate

charges for telephone service, and said power was not surrendered or abridged by the grant of plaintiff's franchise, or otherwise, nor do said ordinances, or either of them, contravene any of the provisions of the Constitution of the United States.

The demurrer to the bill is accordingly sustained.

OLIN WELLBORN,
*Judge.*

This concludes the opinion of the Circuit Court, and we proceed to a further consideration of the points involved in this action as follows:

I.

**The nature and scope of a freeholders' charter of a city under the Constitution and laws of the State of California.**

A fundamental question to be considered in this case is the nature and scope of a freeholders' charter under the constitution and laws of the state of California. The City of Los Angeles is, and has been ever since 1889, existing as a municipal corporation of California and operating under a freeholders' charter. This charter was adopted under the authority of the Constitution of the state itself, as expressed and granted by the provisions of section 8, article XI of that instrument. Said article as it stood in 1889 by amendment adopted in 1887, provided for the adoption of a freeholders' charter in the following comprehensive language:

> "Any city containing a population of more than ten thousand and not more than one hundred thousand inhabitants, may frame a charter for its own government consistent with and subject to the constitution and laws of this state,"

and after its adoption by the people of the city and approval by the legislature it

> "shall become the organic law thereof, and supersede any existing charter and all amendments thereof, and all special laws inconsistent with such charter."

Section 6 of said article XI of the Constitution, as it stood from 1879 to 1896, provided, among other things,

> "That cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws."

As amended in 1896 this section provided that "all charters framed or adopted by authority of the constitution, *except in municipal affairs*," should be "subject to and controlled by general laws."

The question therefore arises at the threshhold of this discussion, as to what length a city may go in framing a charter "for its own government" under the constitution and laws of the state of California. We do not perceive that there is any limitation expressed or implied by these provisions of the constitution upon the powers that may be conferred by a freeholders' charter upon a city; certainly there is no such limitation if the power conferred relates to anything that is appropriate for local government or a proper subject of municipal control. The City of Los Angeles in framing its char-

ter deemed that it should have the power, to be exercised by its council by ordinance, to fix and determine telephone rates. While the constitution, as it existed at the time of the adoption of such charter, provided that the charter should be "subject to and controlled by general laws," there was at that time no general law of the state providing for the regulation of telephone rates inconsistent with the exercise of this power or inconsistent with the vesting thereof in the City of Los Angeles under its charter. There never has been such a law. Since 1906 the charter, "in municipal affairs," is not even subject to or controlled by general laws. There is, therefore, no question involved here between the exercise of the power of rate regulation by the state and the power of such regulation by the city. Can the city, under the constitution and laws of the state of California, be authorized by its charter to regulate telephone rates therein?

The Supreme Court of the state of California, particularly since the adoption of the amendment of Art. 6, Sec. XI, in 1906, has discussed the nature and scope of freeholders' charters in a number of cases, and from them we gather the general proposition that anything which pertains to the government, or to the conduct of the business and internal affairs of the city or that pertains to the interests of its inhabitants, may be properly provided for in a freeholders' charter.

Judge Dillon, in his work on Municipal Corporations, Vol. 1, section 20, page 39, 4th edition, says:

> "A municipal corporation, in its historical and strict sense (is) the corporation by the authority of the government of the inhabitants of a particu-

lar place or district and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with reference to their local and internal concerns. This power of local government is the distinctive purpose and distinguishing feature of a municipal corporation proper.

"The charter of a municipal corporation is its legal authority to exist and to exercise its powers as such. The charter is the organic law of the city—its constitution. It sets forth the form of its government, provides for its officers and agents, specifies their powers and duties and contains an enumeration of the powers of the corporation."

The same author further says, upon this subject:

"While municipal corporations are everywhere instituted for the same general purposes * * * and while there is a striking resemblance in the authority with which they are clothed * * * yet except when organized under general acts the powers given to them in their singular and separate charters are various both in character and extent. True policy indeed * * * requires that the powers of these bodies should in general be confined to subjects connected with civil government and local administration; but legislatures are usually liberal in grants of this character *and there is no limit to the faculties and capacities with which municipal corporations may be endowed except as that limit is contained in the state or federal constitutions.*"

Dillon's Municipal Corporations, 4th edition, Vol. 1, section 102, page 165.

In harmony with the foregoing general statement of Judge Dillon we contend that there is no limitation in the constitution or laws of the state of California upon the powers that may be conferred upon municipal corporations by charters in such state, such as would pre-

clude them from thereby providing for the regulation of telephone rates. The foregoing quotation is but the statement of elementary doctrine and of general application, but nevertheless is appropriate here, and we believe has a bearing upon the precise question we have here first to deal with. It is undoubtedly true that the chief function of municipal corporations should be to govern in respect to local affairs which, as Judge Dillon says (*id.* Sec. 12), can be dealt with better by the people concerned than *by the distant central power.* Whatever qualities may be predicated of municipal charters, it is certainly true that uniformity is not one of their features, and cannot be under any such system for their adoption as the one in existence in the state of California. The author from whom we have quoted, further remarks "that municipal corporations, as they exist in this country are of exceedingly complex character," and he mentions the fact that this arises "from the exceedingly diverse character of the multiform duties which are confided to their agency and management, requiring the delegation of corresponding powers and provisions for their execution." (*Id.* Sec. 14.)

Concerning freeholders' charters under the constitutions of Missouri and California it has been said:

> "The legislature, unless forbidden by the constitution, may incorporate municipalities, in its discretion, either by special act or by general legislation authorizing the erection and organization of cor porations by popular initiative and referendum. The former method was the one in general use in the United States during the last century and is still employed in several states. In some states constitutional provision has been made for the framing

and adoption of a charter by the inhabitants of large cities. This has been true for years past of Missouri and California. Under the unique provisions of the constitutions of these two states, the great cities of St. Louis and San Francisco have framed and shaped their own charters in much the same manner as a state orders its own constitution, thus affording practical examples of municipal home rule without precedent in modern times. In whatever method the charter of municipality is enacted it becomes, when lawfully provided, the fundamental law of the corporation just as the constitution is the fundamental law of the state."

28 Cyc. of Law & Procedure 153.

The charter of the city of St. Louis adopted under special provisions of the Missouri Constitution, which are very similar to those of California in its provisions for freeholders' charters, was discussed by this court as follows:

"As the legislative power of a state is vested in the legislature generally that body has the supreme control and delegates to the municipal corporations such measure thereof as it deems best. The city of St. Louis occupies a unique position. It does not, like most cities, derive its powers by grant from the legislature but it framed its own charter under express authority from the people of the state, given under the constitution. Sections 20 and 21 of article IX of the constitution of 1875 of the state of Missouri authorized the election of thirteen freeholders to prepare a charter to be submitted to the qualified voters of the city, which, when ratified by them, was to 'become an organic law of the city.' Section 22 provided for amendments to be made at intervals of not less than two years and upon the approval of three-fifths of the voters. Sections 23 and 25 required the charter and amendments always to be in harmony with and subject to the constitu-

tion and laws of Missouri and gave to the general assembly the same power over this city, notwithstanding the provisions of this article, as was had over other cities. In pursuance of these provisions of the constitution a charter was prepared and adopted and is therefore the 'organic law' of the city of St. Louis and powers granted by it, so far as they are in harmony with the constitution and laws of the state and have not been set aside by any act of the general assembly, are the powers vested in the city and its charter is an organic act, so defined in the constitution and is to be construed as organic acts are construed. The city is in a very just sense an *imperium in imperio*. Its powers are self-appointed and reserve control existing in the general assembly does not take away the peculiar feature of its charter."

St. Louis v. Western Union Telegraph Co., 149 U. S. 465 (467-8).

Referring, then, to decisions of the California Supreme Court relative to freeholders' charters, their nature and scope, under the Constitution of the state, we call attention to the following:

In 1889 the legislature of California passed a general law for the taking of property for the opening and widening of streets. The Los Angeles charter, ratified by the legislature a few weeks prior to the passage of this act, contained provisions relating to the same subject.

In the case of Davies v. the City of Los Angeles, 86 Cal. 37, these provisions of the city charter were brought in question, and it was held that the general law of the state having the same object, superseded the provision of the charter as to the opening and widening of streets, because the charter was subject to and controlable by

general laws. The decision of the court in this case, however, is based upon the express provision of the constitution that a charter "shall be subject to and controlled by general laws." The court said:

> "It is useless to discuss the propriety of allowing the legislature to interfere by general laws with the local affairs of the city. The constitution so provides in plain terms and so far as the courts of the state are concerned, this must settle the controversy."

Inasmuch as charter provisions relating to the opening and widening of streets in the City of Los Angeles was the subject matter of the controversy, this language of the court is certainly a plain intimation that the opening and widening of streets is a "local affair." There was a dissenting opinion in the case by Mr. Justice Fox in which he said that of the written laws of the state there are four classes; "each in a different mode and by a different body or branch of the government, and each equally binding upon the courts in its appropriate sphere." These are, first,—the constitution established by the people of the state, acting in their collective capacity; second,—the general statute laws of the state, which, by the constitution, must be established by the legislative department of the state government; third,—municipal charters framed and adopted by the people resident within the municipality affected. Such charters may be said to be general laws, in that they apply to and operate upon all people within the territorial limits of the municipality alike; but they are special and local in that they have no force or effect outside of

such territorial limits. Their establishment by the legislative department of the state government is expressly prohibited by the Constitution. (Article 11, Sec. 6.) For the establishment of these laws, the constitution takes from the legislature and delegates to the people of the municipalities respectively, when they shall see fit to exercise it, the power to frame and adopt the law and in that way to establish a special and local law such as the legislature is forbidden to establish. Fourth,—municipal ordinances established by the legislative departments of the respective municipalities and in the manner prescribed by their respective charters or by the general law in cases where municipalities are acting under general law. In commenting upon the prevailing opinion, Justice Fox said:

> "Under such interpretation it is worse than folly for the people of a municipality to avail themselves of the express permission of the constitution and frame and adopt for themselves a municipal charter which the constitution forbids the legislature to alter or amend. For if this interpretation is to prevail, the legislature may do indirectly what it is expressly forbidden to do directly."

This case was decided in 1890 and of course, together with other decisions of the court to the same effect, gave rise to a very general and exhaustive public discussion in California of the scope of freeholders' charters. It is a matter of political history in the state of California that the result of that discussion led to the constitutional amendment of 1896, which provided that freeholders' charters should be subject to the control of general laws, *except in municipal affairs.* (Art. 6, Sec. XI.)

In that same year a new section was added to the Constitution, designated as section 8½, article 11, which provided that it should be competent in all charters framed under the authority given by section 8 of article 11 of the constitution, to provide, in addition to those provisions allowable by the constitution of the state, for the following, among other things:

> "For the constitution, regulation, government and jurisdiction of police courts and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the compensation of said judges, and of their clerks and attaches."

This amendment to the constitution was discussed by the Supreme Court in the case of Martin v. Election Commissioners, 126 Cal. 404-410, and which said:

> "The causes leading up to the adoption of the constitutional amendment, section 8½, are well known. In the freeholders' charter of the City of Los Angeles, provision was made for the establishment of the police court and the election of judges thereof. In People v. Toal, 85 Cal. 333, it was held by this court that such provision of that charter was invalid, for the reason that inferior courts, including police courts, could only be established as provided by article 6 concerning the judicial power of the state, and that it is there provided that the legislature may establish inferior courts in any incorporated city or town or city and county; and this meant that an act must be passed by the legislature in the form and manner prescribed in article IV, legislative department; and that the approval of the freeholders' charter by a vote of the two houses of the legislature, was not equivalent to the passage of a law as provided in said legislative article. * * * It is contended,

however, on the part of the appellants, that the provisions of said amended section 8½ under consideration can not be carried out, for the reason that it would conflict with the general law of the state establishing a uniform system of county and township government; in other words, that the law (*and a freeholders' charter adopted as provided for in the constitution is a law of the highest grade*) cannot be passed, although in pursuance of express power granted by the constitution, because it may, perhaps, infringe upon some other law. *The rule of construction invoked by appellants seems to be that a provision in a law or constitution in reference to a particular matter is inoperative and void if it be inconsistent with the general provisions of said law or constitution. The direct opposite is the true construction in such cases.*" (Citing cases.)

In the case of Miner v. Justice's Court, 121 Cal. 264-266 (decided in 1898), the court, in discussing the effect of the adoption in 1895 of the new freeholders' charter of Berkeley to take the place of a preceding charter which had been granted by special act of the legislature in 1878, said:

"Under the decision of this court in the case of People v. Toal, 85 Cal. 333, the provision in the freeholders' charter for the creation of a justice's court in the town of Berkeley, and the election of justices therefor, was ineffective. By virtue of the provision in section 8 of article 11 of the Constitution that, upon the approval by the legislature of a freeholders' charter, 'it shall become the charter of such city and shall become the organic law thereof, and supersede any existing charter, and all amendments thereof, and all laws inconsistent with such charter,' the charter of the town of Berkeley, which was granted by the act of April 1, 1878, was superseded. Hence the provision in that charter for justices of the peace and a justice's court ceased to ex-

ist or to have any force after the freeholders' charter was adopted. The contention of the petitioner that, inasmuch as the freeholders' charter could not create a court, it could not have the effect to destroy one which was in existence, was fully considered in *Ex parte* Sparks, 120 Cal. 395, involving the effect of a provision in the charter of Sacramento, and it was held not to be tenable. It was there said: 'The old charter is not repealed because it is so enacted in the new charter, or because its provisions are inconsistent with those of the new charter. *The new charter does not abrogate the old ex proprio vigore, but because the constitution declares that such consequence should follow. It is not the passage of an ordinary law, but the establishment of a government.*' "

In the case of *Ex parte* Sparks, referred to in the opinion just quoted from, the court, in discussing a similar question as to the legal effect of the adoption of a new charter of Sacramento (adopted 1894) upon a previous charter, said:

"The new is to take the place of the old, however dissimilar, and, although some parts of the old charter have no corresponding provisions in the new, there is no presumption that anything is continued, for the new scheme is deemed complete in itself and to provide all that is desired. That which is omitted is omitted because not desired. The constitution and maintenance of police courts are usual in such charters, and it can not be said that provisions for them are not parts of the charter. *The scope of a charter is very broad and may be made to include anything of interest to the local government.*"

*Ex parte* Sparks, 120 Cal. 395.

The court then quotes from previous decisions to the effect that in respect to the charter, "the legislature is not the law-maker; it did not frame or pass the law. It was not charged with any duty, and to it was not delegated any power either in framing or adopting the law" (citing People v. Gunn, 85 Cal. 238), and said:

> "It is now expressly provided that the charter may be approved by concurrent resolution, and that then such charter, 'shall become the organic law thereof'—that is, it is the special mode for the enactment of a law by the legislature. *It is clear that it is made a law by the legislature, and becomes a law by this expression of the sovereign will of the state. It prevails and has force as a law of the state*, and it is not made a law by the people of a municipality by virtue of authority delegated to them. It is proposed by the municipality, and is accepted and passed into a law by the legislature or rejected, as it shall see fit.'"
>
> *Ex parte* Sparks (*supra*).

In the case of People v. Williamson, a case which arose since the amendment of 1896 of Sec. 6, Art. XI of the Constitution, it was contended that certain provisions of the city charter of the city and county of San Francisco, relating to the creation of a board of health and prescribing its powers, were void because the state would be *pro tanto* deprived of its police power. The court rejected this contention and said:

> "This board, with its functions, being in its nature, an 'affair' appropriate for a municipality, and being actually contained in the charter is a 'municipal affair' within the meaning heretofore given to the phrase 'municipal affair.' The suggestion that an 'affair' already existing under the laws of the state and for the people generally, including the

inhabitants of the city, can not be made a municipal 'affair,' does not seem to me to merit discussion. The charter supersedes all laws inconsistent therewith. I do not wish to intimate a doubt as to the entire validity of the charter provisions on this subject; but for the purposes of this case, it is not necessary to decided whether some of its provisions are not void because inconsistent with the code provisions. If there is anything which the charter board can lawfully do, the city may maintain it. * * * The charter is itself a law of the state. It matters not for this purpose whether it is a statute passed by the legislature or by a board of freeholders with a referendum to the people. In either view it is law, and made so by the authority of the people of the state. We must presume, if these provisions are valid, that in creating the charter and making it a law, the people have adopted the means, in their judgment, likely to protect the people of the state from such dangers. * * * *It may be true that the freeholders' charter scheme confers greater influence in legislative matters upon the inhabitants of the favored cities than is enjoyed by the people who do not reside in such cities. The inhabitants of the favored cities may participate in making laws for others which have no operation at all as to them, while the outsider, after the charter has been once made, has no voice in making such laws for those within the city, even when he is vitally and directly interested in them. But if this be an inequality, the people have themselves created it, and if a remedy is needed, they only can provide it."*

Referring to the police power as confided to municipalities, the court said:

"Nearly all the ultimate purposes for which government exists come within this power. It has even been said that it includes all the ends of government, as all are, in theory designed to secure the common safety, and to provide for the general wei-

fare. (Tiedeman's Police Power, p. 3.) Cooley defines this power as including the whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent conflict of rights, and to secure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others.

"The police power more specifically refers to the necessity and right of government to place restrictions upon the liberty of individuals, or upon the use of private property for the common advantage. All these things enumerated by Cooley are usually confided, at least in part to municipalities, and are certainly in the charter in question here. If, therefore, the provisions creating the board of health are void because it is an attempt to surrender police powers which the state can not abdicate, then the entire charter must go.

*"But this consequence would not follow, even though the state were not authorized to make a final surrender of powers it holds for the benefit of all the inhabitants of the state. In such case the law would not be invalid, but would give way when the state found it necessary to exercise the same power for the preservation of the health of the people. In the case supposed the consequence would simply be, that the charter would be found not to be beyond legislative control."*

People v. Williamson, 135 Cal. 415, 417, 418, 419.

In the case of *Ex parte* Braun, reported in the 141 Cal. 204, the Supreme Court of California said:

"The meaning of the term 'municipal affairs,' as these words are used in the constitutional amendment of 1896, has been considered in several de-

cisions of this court. In discussing the effect of this amendment this court has always recognized the reason that impelled its adoption. After much public discussion and upon an exhaustive consideration of the question it had been decided by this court that *the legislature, prior to this amendment, had power by general laws to supersede or take away, without the consent of the municipality, the powers conferred upon it by a special charter.* (Citing Thomason v. Ashworth, 73 Cal. 72; People v. Henshaw, 76 Cal. 436, and Davies v. Los Angeles, 86 Cal. 37.)

"These decisions had demonstrated that the power given by the constitution to cities to frame charters for their own government for the purpose, as was stated in People v. Hoge, 55 Cal. 612, 618, of emancipating them from the authority and control formerly exercised over them by the legislature in municipal matters were unavailing if such charters could at once be superseded by any general legislative enactment. Under these circumstances the section of the constitution providing that all cities and towns and the charters thereof should be subject to and controlled by general laws, was amended by the addition of the words 'except in municipal affairs.' Whatever other conflict may be found in the opinions of this court as to the precise meaning of the term it has always been conceded by all of the justices that the object of the amendment was to secure to the municipality that had under the provisions of the constitution adopted a charter for its own government, the maintenance of its charter provisions in municipal matters and to deprive the legislature of the power, by laws general in form, to interfere in the government and management of a municipality. It was enacted upon the principle as stated by Justice Garroute in Fragley v. Phelan, 126 Cal. 383-387.

" 'That the municipality itself knew better what it wanted and needed than did the state at large and to give that municipality the exclusive privi-

lege and right to enact direct legislation which would carry out and satisfy its wants and needs.' The words used in the amendment are words of wide import, broad enough to include all powers appropriate for a municipality to possess and actually conferred upon it by the sovereign power. * * * When the power to impose tax is conferred upon a municipality to enable it to raise the money essential for the purposes for which it is created, that power necessarily becomes a municipal affair, as was said of other powers and duties in People v. Williamson, 135 Cal. 415. They are peculiarly for the inhabitants of the city and not directly for the benefit of any one else. * * * The case of Alexander v. City of Elizabeth, 56 N. J. Law, 71, is in point upon this question of municipal affairs. The state of New Jersey provided that the legislature should not pass private, local or special laws regulating the internal affairs of towns and counties. The legislature by special act attempted to provide for the licensing and regulating of race courses by municipal authorities and it was held that while primarily racing within the state was not a question which concerned the internal affairs of towns and counties a statute which confers powers upon a municipality to restrict, limit or extend racing is a statute which does undoubtedly affect internal affairs of such towns within the meaning of the constitution. It becomes a matter of the internal regulation of the affairs of the municipality by force of the statute and it can not be claimed so far as the statute is concerned, to be a question any longer of state policy but a matter concerning the internal affairs of the municipality to which it applies. It becomes the power of the municipality." * * *

The court continued:

"It is of course true that the local power of taxation, like all other local powers, must have its origin in a grant by the state and that it may at all

times be controlled by the sovereign power, but it does not follow that the legislative power of the state may so control it. In the absence of constitutional provisions relating to the subject the legislative department would necessarily have unlimited sway and could, if the state control, modify or withdraw the power and prescribe such regulations as it saw fit for its exercise. The state constitution is, however, the highest expression of the will of the people of the state and so far as it speaks, represents the state, so where, as here, a power is given in the constitutional method by special charter and not by direct legislative enactment it can be withdrawn only by amendment to the charter, in the manner provided by the constitution. It is only when local power is not conferred by the state constitution that legislative enactment is essential to its existence (Cooley on Taxation, 678), or is of adequate force to withdraw it.

"The power of cities operating under freeholders' charters to raise money by taxation for municipal purposes does not find its source in any grant by the legislature. There is no enactment by the legislature purporting to vest such authority in such cities. Such power has been directly granted by the people of the state by the provisions of the state constitution. * * * It has already been attempted to be shown that when a power is conferred upon a municipality for municipal purposes that power becomes a municipal affair, as was said by the Supreme Court of New Jersey in Sutterly v. Camden, Common Pleas, 41 N. J. Law 495. 'To repeal a section of the city charter which confers some power of government or one restraining or limiting the exercise of some other, may be as effectually an interference with a regulation of its internal affairs as a law setting up within the municipality some new adjunct to the local government or one which introduces radical change in the instruments and methods of administration.' "

*Ex parte* Braun, 141 Cal. 204.

Again, in the case of Fritz v. San Francisco, 132 Cal. 373, a general law of the state known as the "Park and Boulevard Act" was under discussion. In deciding that a scheme for acquiring land for parks and boulevards embodied in the San Francisco charter rendered the general law inoperative in that city, the Supreme Court said:

> "Condensing the matter into a nutshell, it may be said that the Park and Boulevard Act provided a complete scheme for the acquisition of lands for park and boulevard purposes by the issuance of bonds, the proceeds thereof to be used for that purpose. Now, do we find any complete scheme laid down in the provisions of the charter to accomplish the same results? The court is entirely satisfied that such a scheme is there found. Section 29 of article XVI of that instrument provides: 'When the supervisors shall determine that the public interest requires the construction or acquisition of any permanent municipal building or improvement, the cost of which, in addition to the other expenses of the city and county, will exceed the income and revenue provided for the city and county for any one year, they must, by ordinance passed by the affirmative vote of not less than fourteen members of the board, submit a proposition to incur a bonded indebtedness for such purposes to the electors of the city and county, at a special election to be held for that purpose only. All the provisions of this charter providing for the acquisition of public utilities, so far as the same are applicable, shall apply to the manner of submitting such proposition to the electors, to the limitations of said bonded indebtedness, to the issuance and character of the same, and to the time when and the kind of money in which said bonded indebtedness shall be payable.' Measured by the notice of election given in these proceedings it appears that this bonded indebtedness was to be created 'for the acquisition, by pur-

chase, or by condemnation proceedings according to law, of the following lands for public park purposes': 1. Thirteen blocks being for an extension of a Panhandle of Golden Gate park; 2. Eight blocks for a connection between said Golden Gate park and a Presidio military reservation; 3. Two blocks for a public park in that part of the city and county known as the Mission.

"Chapter II of article II of the charter defines the powers of the board of supervisors, and subdivision 12 thereof declares, 'To purchase or acquire by condemnation such property as may be needed for public use.' By this provision of the law the board of supervisors of the city and county of San Francisco is vested with power to purchase land for a public park. The question then remains, Does this proposed acquisition of lands for public park purposes come within the provisions of the aforesaid charter section, which allow the supervisors to submit to the electors the question of the creation of a bonded indebtedness for the purpose of 'acquisition of any permanent municipal building or improvements'? The court is satisfied that the acquisition of these lands for park purposes, by the city, would be an acquisition by the city and county of a permanent municipal improvement within the spirit and intent of the charter. An extension of the Panhandle to Van Ness avenue would be a permanent municipal improvement of the highest character; likewise would be the acquisition of eight blocks of land for the purpose of connecting the park with Presidio military reservation; and likewise the acquisition of two blocks in the Mission district for public park purposes. If Golden Gate park may be designated as a permanent municipal improvement of the city and county of San Francisco then the extension of that park by way of boulevards to the military reservation and to Van Ness avenue is an improvement of a like character. It is thus apparent that the acquisition of this property by the city and county is authorized by the sec-

tion of the charter quoted, wherein the power to acquire permanent municipal improvements is granted.

"The scheme for the acquisition of this property as set out in the provisions of its charter, is also perfect and complete. Section 6, previously quoted, declares that 'all the provisions of this charter providing for the acquisition of public utilities, so far as the same are applicable, shall apply to the manner of submitting such propositions to the electors, to the limitation of said bonded indebtedness, to the issuance and character of the same, and to the time when and the kind of money in which said bonded indebtedness shall be payable.' Upon turning to article XII of the charter, we find there laid down a comprehensive scheme, perfect and full in all its details, providing for the acquisition of public utilities by the creation of a bonded indebtedness. As we have seen, the provisions of that article are made applicable to the provisions of said section 6, and thus we find within the provisions of the charter a complete and perfect scheme for the acquisition of permanent municipal improvements of the character now before us. The respective schemes of the charter and the Park and Boulevard Act for the creation of a bonded indebtedness to acquire improvements are different in many respects, and therefore the Park and Boulevard Act is inconsistent with the charter. *The results declared by the constitution, where such inconsistency exists, must follow; namely, the Park and Boulevard Act is superseded by the charter.* That act being superseded by the charter, it is gone from the case. It went instanter the moment the charter took effect. It is no more a law applicable to the city and county of San Francisco, and its provisions can no longer be invoked to support this proceeding."

The following have been held by the Supreme Court of the state of California to be "municipal affairs" and



the proper subject of provision in a freeholders' charter. The fixing of salaries of members of the police and fire departments; (Popper v. Broderick, 123 Cal. 456). The matter of opening and widening of streets of a municipality; (Byrne v. Drain, 126 Cal. 663). The provision of a charter prescribing the manner of passage and approval of ordinances; (Morton v. Broderick, 118 Cal. 474). The purchase of lands for parks and boulevards and the issuance of bonds because it is authorized by the charter itself; (Fritz v. San Francisco, 132 Cal. 373, *supra*). The management of hospitals and almshouses; (Weaver v. Reddy, 135, 139 Cal. 430). The imposing of license taxes for revenue; (*Ex-parte* Helm, 143 Cal. 553; *Ex-parte* Lemon, 143 Cal. 558; *Ex-parte* Jackson, 143 Cal. 564; *Ex-parte* Braun, 141 Cal. 204). The exercise of powers and duties by the municipal board of health established under the charter; (People v. Williamson, 135 Cal. 415, *supra*). A scheme of local legislation by the people directly known as the "initiative"; (*In re* Pfahler (Cal.), 88 Pac. 270).

Another case, illustrative of this subject is that of Byrne v. Drain, from which we quote as follows:

> "The charter of the city of Los Angeles contains full provisions touching the same subject matter, which provisions differ radically from those of the general street law. (Charter of Los Angeles, Secs. 148-89.) These facts are made to appear by the complaint, and the primary question raised on demurrer and thus presented for consideration is whether, at the time of the institution and prosecution of these proceedings, the provisions of the city charter or the provisions of the statute of 1889 constituted the controlling law. If the latter control, then the proceedings are admittedly valid; if

the former, then the proceedings are void upon their face.

"The charter of the City of Los Angeles was adopted on January 31, 1889. At that time the constitution provided: 'Cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws.' (Const., Art. XI, Sec. 6.) There was no general law upon the subject of the opening of streets until March 6, 1889, when the statute under which these proceedings were had was approved. In 1896, the above-quoted section 6 of article XI of the constitution was amended so that it now reads, and read at the time of the initiation of the proceedings for opening the street: 'Cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution except in municipal affairs, shall be subject to and controlled by general laws.' From January 31, 1889, until the passage of the act of March 6, 1889, it is admitted that the provisions of the charter of the city relative to these matters were in full force and effect. After the passage of the act of March 6, 1889, it is conceded that they ceased to be operative unless restored by the terms of article XI, section 6, as amended.

"By respondent it is contended that the effect of the adoption of the general statute of March 6th was absolutely to extinguish, annul, and repeal the charter provisions. By appellant it is insisted that, since the charter provisions were valid and in force when the charter became the organic law of the city, the effect of a general statute upon those valid provisions under the very terms of the constitution was not to work a repeal, but the effect merely a suspension of their operation—to subject them to the control of such general law while it remained in operation. This was the view taken by the learned judge of the trial court in passing upon the demurrer, and we think it unquestionably sound.

It is to be borne in mind that the case which we are considering is not one where the provisions of a charter, when the charter becomes a law, are in conflict with existing general laws, but it is the case of charter provisions admittedly valid at the time of their adoption coming in conflict with the provisions of a general law subsequently passed. The constitution does not declare the provisions of the charter under such circumstances are repealed or annulled. It declares merely that the charter provisions shall be subject to and controlled by general laws. As was well said by the trial judge in passing upon the demurrer: 'The word "subject" when used as an intransitive verb, means "to become subservient to;" and as a transitive verb it means "to cause to become subject or subordinate." The word "control" is defined as follows: "To exercise a directing, restraining, or governing influence over, direct, counteract, regulate." (Standard Dictionary.) Neither of these terms is used to express the idea of repealing, extinguishing, or doing away with. Nothing in the context indicates such a meaning. The very idea of being subject to or controlled by a higher power or law necessarily implies the continued existence of the thing controlled or subjected so long as the control or subjection continues. That which is extinguished, repealed, or destroyed cannot be said to be afterward under control or subjection.' The situation thus presented is not dissimilar to that which obtained during the existence of the national bankruptcy act. It was competent for this state to pass an insolvency act while the bankruptcy act of the United States was in force, but the operation of the state law was suspended, and the state law was controlled by the federal act. (Seattle Coal, etc. Co. v. Thomas, 57 Cal. 197.) It is similar to the condition of things that exists when a state law providing for the inheritance by aliens of property within its domain is in conflict with the treaty regulations of the United States upon the same subject matter. It

is uniformly held, not that the state laws are abrogated or repealed, but that they are suspended and controlled by the treaty during the period of its existence. (De Geofroy v. Riggs, 133 U. S. 258; Blythe v. Hinckley, ante, p. 431.)

"By the above-quoted amendment to the constitution in 1896, we think it clear that the provisions of the charter of Los Angeles touching upon this matter were relieved from the control of the statute of March 6th. The amendment was retrospective, and applied to all existing charters. (Morton v. Broderick, 118 Cal. 486; Popper v. Broderick, 123 Cal. 456.) That the matter of opening the streets of a municipality is a municipal affair is not disputable under the authorities. (Sinton v. Ashbury, 41 Cal. 531; People v. Holliday, 93 Cal. 241; 27 Am. St. Rep. 186; Hellman v. Shoulters, 114 Cal. 141.) As the charter of the City of Los Angeles ceased, upon the adoption of the amendment to article XI, section 6, to be subject to and controlled by general laws in its municipal affairs, it follows from the foregoing that its provisions relative to street opening came again into force, and that the assessment in this case was based upon proceedings taken under a law having no longer any applicability to the city. The assessment was, therefore, void, as the trial court properly decided."

Byrne v. Drain, 127 Cal. 663, 665.

The case of Fragley v. Phelan, 126 Cal. 383, is in point as containing a full expression of what powers fall within the domain of "municipal affairs" under the constitution of California. The essential part of the opinion therein bearing upon this subject is as follows:

"The solution of the questions thus presented largely revolves around the meaning of the words 'except in municipal affairs,' as these words are used in the constitution of the state. The phrase formed by these words has a meaning, and a most

significant one. This is apparent when we pause a moment to consider that this single phrase forms the subject matter of an amendment to the constitution of the state. The relationship existing between a state and its municipalities is so close that it may be said every city ordinance and every state statute is a matter of interest to both state and municipality. It may be said that all state affairs are a matter of substantial interest to the municipality, and that likewise all municipal affairs are a matter of concern to the state. Yet those interests are incidental and indirect, and the meaning of this phrase necessarily takes a narrower scope. Indeed, in the very wording of the constitutional provision itself we find that all matter of legislation pertaining to and bearing upon municipalities do not come within the signification of the words 'municipal affairs,' as used in the constitution. A mere glance at the provision demonstrates this fact. The constitution provides that cities and towns, 'except as to municipal affairs,' shall be subject to and controlled by general laws. It is here plainly indicated that a vast amount of legislation pertaining to cities and towns does not come under the classification of 'municipal affairs.'

"For the purpose of getting at the true significance of these words, there is no brighter light to be shed upon them, than is disclosed by a consideration of the reasons which moved the legislature to propose the amendment, and the people to adopt it. What was the evil to be remedied? What was the good to be gained by this amendment? The answer is common, every-day history. It was to prevent existing provisions of charters from being frittered away by general laws. It was to enable municipalities to conduct their own business and control their own affairs to the fullest possible extent in their own way. It was enacted upon the principle that the municipality itself knew better what it wanted and needed than did the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which

would carry out and satisfy its wants and needs. These are a few of the reasons which gave occasion for this concise, but all-significant, amendment to section 6 of article XI of the constitution of the state. This amendment, then, was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws; and this internal regulation and control by municipalities comprise those 'municipal affairs' spoken of in the constitution.

"Municipal affairs, as those words are used in the organic law, refer to the internal business affairs of a municipality. It was the internal business affairs of municipalities then existing and those of municipalities to be hereafter created that the constitutional amendment was framed to meet. There is no sound reason why freeholders' charters should not be framed and ratified under general laws. There are a multitude of sound reasons to be urged why the conduct and procedure of elections for the election of freeholders and ratification of charters should be held under general laws. No sound policy exists demanding special legislation upon such a subject matter. As far as there has been given us light to see, neither the legislature nor the people ever thought of such a thing as the adoption of charters when they placed the words 'municipal affairs' in the organic law. In defining the phrase 'county affairs' the court said in Hankins v. Mayor, 64 N. Y. 22: 'County affairs are those relating to the county in its organic and corporate capacity, and included within its governmental or corporate powers.' Tested by this rule elections held as preliminary steps toward the creation of a freeholders' charter are not municipal affairs."

From the foregoing decisions of the Supreme Court of California we submit that the following conclusions are deducible therefrom and sustained thereby:

*First:* A freeholders' charter may contain provisions that include powers properly belonging to the state, exercisable by the legislature in the form of general laws. The only limitation in that domain placed, or that ever was placed, upon freeholders' charters is that their provisions were subject to and controlled by general laws.

*Second:* The very language of the constitution (Sec. 6, Art. XI) contemplates that matters other than "municipal affairs" might be provided for in a freeholders' charter.

*Third:* That if a power within the sphere of state action and exercisable by the legislature, is embodied in such charter, nevertheless such power is perfectly valid, and remains in the city, until the legislature takes that power from the city by enacting a general law upon the subject. When such a power is delegated to a city in a freeholders' charter, it is not invalid on any theory that it is a power the state cannot abdicate; it is incident to the grant of power to frame a charter for city government, and is valid until superseded by the state.

*Fourth:* The doctrine that powers not strictly incident or necessary to the city government cannot be delegated to a city under a freeholders' charter does not prevail in California. On the contrary, such a power is capable of being so delegated, and its exercise by the city is valid, until the state steps in and *resumes* that which it has extended to the city.

Byrne v. Drain, (*supra.*)

People v. Williamson (*supra.*)

It will be observed that a freeholders' charter under the constitution of California is not law until it has been finally ratified and approved by the legislature. The legislature represents the sovereign power of the people as vested in the legislative department of the state government. A freeholders' charter in California is not, therefore, merely the result of action by the people of the city, under direct constitutional authority conferred upon them; it has also the sanction, and to be a charter at all, must have the sanction of the legislature. Therefore, if the objection to the delegation of a particular power be, as is here made, that the *legislature* has not delegated it, we submit that the answer is that *the legislature has delegated it in approving the charter.* While corporations for municipal purposes cannot be created by special laws, (Sec. 6, Art. XI, Constitution of California), the creation of a city under a freeholders' charter, does not violate this constitution, because another section of the constitution expressly authorizes such a thing. It must necessarily follow, therefore, that the action of the legislature in affirming a freeholders' charter is not a "special law" within the meaning of those words as used in the constitution.

In the case of Fragley v. Phelan, 126 Cal. 383, the Supreme Court of California, in referring to the function of the legislature in affirming freeholders' charters said:

> "Viewing this question from another angle, it seems that the creation of a charter is not essentially and alone a municipal affair. It is a state affair, and that fact is recognized in unmistakable terms by the state when the constitution demands

that the state legislature approve the instrument by a majority vote; and until such approval it has no life. Notwithstanding all the people of the municipality with a single voice may ask for a new charter, yet the state, by and through its legislature, may deny that request. The legislature stands as the representative of the sovereign power of the state, and has the arbitrary right to grant or refuse charters to municipalities. A grant of a charter to a municipality is a grant of so much power. It is a delegation of a certain amount of power to the municipality theretofore vested in the state. It is a parting with a portion of its sovereignty. It is for this reason that the state, through its legislature, must breathe into the charter the breath of life; and if the state withhold its breath such action is beyond all review. When the constitution vested this omnipotent power in the legislature, it would seem that the framers of that instrument deemed the creation of a municipal corporation a state affair of the greatest import."

It is conceded here that the state itself might, by an act of the legislature in the form of a "general law" make provision for regulating telephone rates. That such a law would be the exercise of police power is a settled principle of law, universally recognized. If then the state has that power, there is nothing in the constitution of California that precludes the delegation thereof to a city in its charter.

Upon the theory that the legislature might enact a general law for the regulation of telephone rates applicable throughout the state, and that the regulation of such rate is not a "municipal affair," as appellant continues, it does not follow that the delegation of the power to regulate such rates to the City of Los Angeles in

its charter is void. The regulation of such rates pertains to the police power, and if the state delegates it to a city, such delegation is good until the state resumes its control over the subject. But the legislature never has passed such a law, and under the doctrine of the case of Byrne v. Drain (*supra*) and People v. Williamson (*supra*) we submit that the exercise of the rate regulating power by the city is valid. We say this result obtains even upon appellant's contention that the regulation of telephone rates is not a "municipal affair." But if it is proper for cities to be authorized to regulate rates, under a general law, it must be for the reason, after all, that such power is a proper municipal concern, very intimately affecting the welfare of the city and its inhabitants. That the regulation of telephone, and other public utility rates, is within the domain of municipal affairs, we think is evident from appellants own position that the city may *contract* for such rates. It would seem that if it is competent, by constitutional provision or by general laws to authorize cities to make contracts relative to telephone rates, or to regulate them otherwise, it is also competent to authorize a city to do so under charter provision. The *subject matter* in either case is the same, and it is in either case the exercise of delegated power *which can be delegated.*

II.

**Appellant's contention that there is no provision of law in California by which municipalities in general can guard themselves against undue charges for telegraph and telephone service, except the power to agree upon maximum rates in the sale of a franchise under the "Brougton Act," is unfounded.**

In support of the contention above stated (page 59 of appellant's brief) counsel for appellant refer us to the provision of the constitution (Sec. 6, Art. XI) forbidding the creation of corporations for municipal purposes by special laws, and requiring the legislature by general laws to provide for the incorporation, organization and classification, in proportion to population of cities and towns. Also to the municipal incorporation act of 1883, which provides for six classes of cities and towns. It is said that "neither that act nor any other statute confers the power upon any class of municipal corporations to exercise the governmental function of legislating upon telegraph or telephone rates."

Reference is then made by counsel to Sec. 33, Art. IV of the California constitution. It is not quoted in full, but the whole section should be before us, and we here give it as follows:

> "The legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, and the charges by corporations or individuals for storage and wharfage, in which there is a public use; and where laws shall provide for the selection of any person or officer to regulate and limit such rates, no such person or officer shall be selected by any corporation or indi-

> vidual interested in the business to be regulated, and no person shall be selected who is an officer or stockholder in any such corporation."

Admitting that the word "telegraph" as used in this section might be held to apply to "telephone companies," it remains, as counsel say, that "the legislature has passed no law of the kind contemplated by the constitutional provision." But does it follow that this provision contemplates the passage of a general law by the legislature for the limitation and regulation of charges by municipal corporations? It might reasonably be inferred from the failure of the legislature to pass such a law that the real purpose of the section is other than what counsel suppose it to be, or that the necessity for the laws apparently contemplated thereby has not arisen. Certainly it cannot be presumed with safety, that because of the presence of this section in the constitution, that cities cannot be authorized to regulate and limit telephone charges by provision in freeholders' charters.

We invite the court's attention to the view of the Circuit Court upon this construction to be placed upon this section. (*Ante*, pages 38-40.) There is, however, a discussion of its meaning in the opinion of the Supreme Court of California in a recent case.

The city of Pomona, California, being a city of the fifth class, organized under the general municipal incorporation act, just referred to, passed an ordinance regulating gas rates and making it a misdemeanor to collect or receive more than the maximum rates therein prescribed. It was contended, in a proceeding brought to review the judgment of fine and imprisonment

against the petitioner, that there was no offense charged —first, because the municipality had no power to limit gas rates by ordinance; and second, because the city had no power to make the violation of such ordinance a misdemeanor punishable by fine or imprisonment. The Supreme Court said:

> "Regarding both propositions, it is contended by the respondent that in the absence of any other statutory or constitutional grant of power every provision of the ordinance is fully supported by section 11 of article XI of the constitution, which reads as follows: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." *By this section the people have made a direct constitutional grant of the police power of the state to every municipal corporation for local purposes.* It is conceded by the petitioner that the general grant of legislative power in the constitution of a state includes the power to regulate gas rates by statute, and that this power may be delegated by statute to municipal corporations. If this is so, and if the regulation of gas rates by the state is an exercise of the police power, it would be difficult to say why, in the absence of more specific provisions in our constitution relating to this matter, the municipal corporations of the state could not by virtue of the section above quoted adopt and enforce within their local limits ordinances as comprehensive, both as to the establishment of rates and the infliction of penalties, as the statutes which the legislature is competent to enact for the state at large.
>
> "But these are questions which we do not find it necessary to decide. The constitution contains specific provisions relating to the matter of limiting the charges of gas furnished to cities and their inhabitants, provisions which in and by themselves furnish a complete answer to the petitioner's first

proposition, and in connection with others an equally satisfactory answer to the second.

"By section 19 of article XI of the constitution it is provided: 'In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.'

"This section very clearly gives to every municipal corporation the right to regulate the charges of any person or corporation supplying gas to a city or its inhabitants through pipes laid in the public streets, and in the absence of any other provision relating to the matter would be held to imply the power to exercise the right by the same methods by which its legislative power is exercised generally, so that nothing would be required to make the section completely operative beyond a law for the organization of municipal corporations and prescribing a mode of exercising their legislative power. In other words, a right to regulate coupled with a lawful method of exercising the right is all that is requisite to give validity to a regulation, and here we have the right conferred by the constitution, and a mode prescribed by the legislature for its exercise. That is to say, cities may be organized—as the city of Pomona has been organized—

under the General Municipal Corporation Act, by which they are empowered to pass ordinances. In cities of the fifth class they are provided with a board of trustees who are empowered to pass ordinances not to conflict with the constitution, or the laws of the state or of the United States, and the forms to be observed in the passage of ordinances are definitely prescribed. (Stats. 1883, p. 250.)

"This would seem to be conclusive as to the validity of that part of the ordinance establishing the maximum rate, and it would be entirely so if it were not for the fact that section 33 of article IV of the constitution provides as follows: 'The legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations, and the charges by corporations or individuals for storage and wharfage, in which there is a public use; and where laws shall provide for the selection of any person or officer to regulate and limit such rates, no such person or officer shall be selected by any corporation or individual interested in the business to be regulated, and no person shall be selected who is an officer or stockholder in any such corporation.'

"It is contended that this section would be rendered entirely inoperative and meaningless if section 19 of article XI should be held to be self-executing—that the framers of the constitution having enjoined upon the legislature the duty of passing laws for the regulation and limitation of gas rates, no valid ordinance can be passed under section 19 of article XI until the legislature has first obeyed the mandate which required it to regulate the mode of regulation. In answer to this it may be said that we have not held that said section is in itself absolutely self-executing. It merely conferred or secured a right without the power of exercising or enforcing it, outside of those municipal corporations then in existence, and armed with powers similar to those which Pomona and all cities

of the fifth class have since acquired by organizing under the general municipal corporation act. But for the fact that the enactment of this law was specifically enjoined by section 6 of article XI, it might perhaps have been deemed a compliance with the mandate of section 33 of article IV. Evidently, however, if that section is to have any operation, it must be construed in some other sense. *What exactly it does mean it is difficult to say.* It may mean, as held by Judge Wilbur of the Superior Court, that the legislature was to pass a law for the organization of some board or commission to fix gas rates for rural districts not incorporated but supplied with gas; and the wording of the last part of the section gives countenance to this view. Or it may mean that the legislature must enact laws making it compulsory upon the governing bodies of our municipal corporations to establish rates at frequent intervals, and prescribing penalties for failure to do so, as the constitution has itself done in regard to persons supplying water. Certainly if the legislature had passed a law of either character here suggested, there would have been no ground upon which this court could have held that something more was requisite to carry out the purpose of the constitution. Petitioner's claim is, that the purpose of this section was the protection of persons supplying gas and other commodities by leaving section 19 of article XI inoperative as to the fixing of gas rates, until the legislature had enacted a code of procedure for the city councils providing, among other things, for notice and hearing and prescribing the period during which a rate once fixed should endure. But all this is purely conjectural. *We do not know, and can hardly surmise, what the precise purpose of section 33 of article IV was. We can be very certain, however, of one thing that was not its purpose. Without bringing it in direct and irreconcilable conflict with section 19 of article XI it cannot be held to have required or authorized the regulation of gas rates in*

*any incorporated city to be taken away from the governing body of such city and given over to any person, board, or officer, to be selected outside of such governing body.* And yet it does contemplate (in its last clause) the enactment of laws under which some person or officer is to be chosen (specially) to fix rates. *This, as above stated, tends very strongly to sustain the view of Judge Wilbur, that the laws contemplated and enjoined by said section 33 are laws applicable solely to districts outside of incorporated cities, and if so the failure to enact such laws—due no doubt to the absence of any actual occasion for applying them—can have no effect upon the operation of a provision of the constitution relating exclusively to municipal corporations."*

Denninger v. Recorder's Court, 145 Cal. 629.

From the foregoing language of the Supreme Court of California bearing upon section 33 of article IV of the constitution, it is evident that no reliance can be placed upon it, or upon any conjectural action of the legislature thereunder, not yet taken, in supporting a theory here that would only permit a city to regulate telephone rates by authority given by some general law of the state. There is even a strong intimation, in the court's opinion, that in the absence of any other authority public utility rates might be regulated under the section of the constitution (Sec. 11, Art. XI) authorizing cities to make and enforce within their limits "All such local, police, sanitary, and other regulations as are not in conflict with general laws."

Counsel say (page 60 of brief for appellant) that "If under said Sec. 33, Art. IV of the constitution, it is competent for the legislature to delegate this power to pass

laws for the regulation and limitation of charges of telegraph and telephone companies to municipalities, certain it is, under the decisions, that unless authority is delegated to any given municipality *by some law of the state,* it cannot be exercised by it." We presume counsel mean some *general* law of the state. The California Supreme Court has already held, in express words, that a freeholders' charter is "a law of the state."

People v. Williamson, (*supra.*)

But assuming that counsel mean some *general* law of the state, we submit that the authorities cited do not sustain the proposition they advance (for these citations, see page 60, appellant's brief).

Appellant's counsel cite the case of Tacoma Gas and Electric Light Company v. the City of Tacoma, 14 Wash. 288, (44 Pac. Rep. 655, 666). We note the fact that they do not cite any decisions of the courts of California to sustain their proposition; and we venture to assert that there are none. The proposition is stated in broad terms, but there is a danger in applying cases from other jurisdictions, which are manifestly to be considered in the light of the facts and particular circumstances under which the decisions were rendered.

The facts of this case were that in 1884 the city of Tacoma granted to John W. Sprague and assigns, the right and privilege to supply the city of Tacoma and its inhabitants with light by gas, electricity or other means, and to lay pipes in the street for this purpose, and for which he or his assigns were authorized and empowered to charge the consumer reasonable rates. In 1895 the

city enacted an ordinance fixing the maximum rates for gas at $1.50 per thousand cubic feet for light and $1.25 for heating. It does not appear that any reservation of power over such rates was made in the ordinance granting the franchise, or that any such power existed in the city at the time the franchise was granted.

The constitution of the state of Washington provided that "any city containing a population of twenty thousand inhabitants or more should be permitted to frame a charter for its own government consistent with and subject to the constitution and laws of this state." *Such charter did not require legislative approval,* and the section of the constitution of Washington (Sec. 10, Art. VI) relating to such city charters, further provided that when adopted by a municipality of the qualified voters ratifying the same, the charter should become the organic law thereof and supersede any existing charter, including amendments thereto, and all special laws inconsistent with such charter.

At the legislative session of 1890, an act was passed relating to the organization of cities of the first class, which should be organized and governed "according to the law providing for the government of cities having a population of twenty thousand or more inhabitants," in accordance with said section 10 article VI of the constitution of the state, called an "Enabling Act." The statute set forth in detail the procedure for the adoption of freeholders' charters and it expressly enumerated what the powers of such city should be. And it is well to note here that there is and never has been any law in the state of California, purporting to limit, or otherwise define

what power might be conferred upon a city in a freeholders' charter.

The act, (see the laws of Washington of 1890, page 143, *et seq.*) really contemplated the classification of cities having the designated population as cities of the first class and enumerated what their powers should be. Among such powers was the following:

> "To provide for lighting the streets and all public places and for furnishing the inhabitants thereof with gas or other lights, and to erect or otherwise acquire and to maintain the same, or to authorize the erection and maintenance of such works as may be necessary and convenient therefor, and to *regulate and control the use thereof.*"

The clause preceding the one just quoted authorized the city, in framing its charter, to provide for erecting, purchasing or otherwise acquiring water works to supply the city and its inhabitants with water, or to authorize the construction of the same by others when deemed for the best interest of such city and its inhabitants, and to *regulate and control the use and price of the water so supplied.*

The statute referred to was a general law, and therefore the city of Tacoma in adopting its charter under this act was, as provided in the constitution, only permitted to make it consistent with and subject to the constitution and laws of the state. Therefore, there was in existence a general law of the state prescribing the powers of freeholders' charter cities, and, as the court in that case pointed out, that law did not authorize the city to regulate or control the *price of lights.* This was significant, and evidently *ex industria*, because the act did

authorize the city to provide in its charter for the regulation and control of the *price of water.*

The court held, therefore, that an attempt on the part of the city to amplify its powers so as to include the power to regulate lighting rates was not authorized by the general law and by necessary implication was denied to it. This case, therefore, simply is a construction upon the constitution and laws of Washington, and holds *that where there is a general law prescribing the powers of charter cities,* such cities cannot assume powers in contravention of such statute.

The theory that *enabling* acts are necessary or proper to enable cities to avail themselves of the constitutional right given them to frame and adopt charters does not prevail in California and hence the principle declared in this case has no application here.

But while the case referred to may be construed as tending, in connection with previous decisions of the Supreme Court of the state of Washington, to circumscribe the field of municipal home rule as capable of embodiment in freeholders' charters, the reasoning on which it is based has been directly disapproved by the Supreme Court of Minnesota. In reason and authority we think such tendency would be rejected in the state of California for the same reasons stated in the Minnesota court in the case of State *ex rel* Ryan v. District Court of Ramsey County. There the court held that provisions in the charter of the city of St. Paul, which, under the state constitution was required always to be in "harmony with and subject to the constitution of the state of Minnesota," provided a special scheme for the exercise of

the power of eminent domain in laying out, opening and improving streets in said city were valid. The court said:

> "It is true that the right of eminent domain is not expressed in the constitution. Hence, if it exists it must be inherent, but we surmise that relator's counsel has not sufficiently discriminated between that which is inherent in the state and that which is inaccurately assumed to be inherent in the constitution; for the constitution must not be confounded with the state nor with the absolute rights reserved to its people. Hence the statement that the right to exercise the sovereign power of eminent domain by the state, though strictly true means exactly that it is reserved to the people, but the people may change their fundamental law by the methods prescribed therein in any manner not subversive of the republican form of government or in any way that does not prescribe aristocratic or monarchial innovations. * * * But the people being the paramount source of power, it always follows that the legislature does not confer this right absolutely nor beyond the reserve power of the people to confer it upon municipalities or their governing bodies, when, by the fundamental law, legislative authority is abridged or charged (changed ?) in that respect by a different distribution or a new gift of governmental authority. * * * The validity of the home rule article in the Missouri constitution has been acknowledged by the Supreme Court of the United States, who hold that a charter framed under it was an organic act of the municipality to be construed as organic acts are construed; also that a 'city incorporated thereunder was in a very just sense an *imperium imperio* whose powers are self appointed,' citing St. Louis v. Western Union Telegraph Company, 149 U. S. 465."

The Supreme Court of Minnesota refers to decisions of the Supreme Court of Washington bearing upon the scope of the "home-rule" article in the constitution of that state, including the case just discussed in the Tacoma Gas and Electric Light Company v. Tacoma, 14 Wash. 288, and said:

> "So far as these decisions are opposed to the conclusions we have above expressed, after due considerations of the reasons upon which they are grounded, we cannot follow that court."
>
> 91 N. W. Rep., State *ex rel* Ryan, v. District Court of Ramsey County, 300. (87 Minn. 146.)

Appellant cites the case of State vs. M & K. Tel. Co. 184 Mo. 83.

This case seems to proceed upon the theory that powers not exclusively municipal in their nature, that is, governmental powers of a character not essentially pertaining "to the city government," or necessary thereto, may by the state acting through its legislature, and only by that means, be delegated to a city, but until they are so delegated, they are reserved to the state. We submit that the reverse of this proposition obtains in the state of California. Our constitution provides that freeholders' charters, *except in municipal affairs, shall be subject to and controlled by general laws.* It follows from the very language used that there may be placed in a city charter provisions which contemplate the exercise of powers not essentially pertaining to the city government. A charter, with us, as to municipal affairs is supreme; as to affairs not strictly municipal, it is subject only to the control of general laws, but as to such affairs the charter provisions are not void; they are operative until the

general law supersedes them. In the Missouri telephone case it was held that the regulation of telephone rates not being, in the opinion of the court, a power "necessary or incident to the government of a municipality," could be conferred on a municipal corporation *by the legislature*, but as such power it was not an incident to the granting of power to frame a charter for a city government it was not so delegated—it was reserved. This means, of course, that being reserved it did not pass from the state to the municipal corporation at all and had no force whatever as a charter provision.

In California, however, we believe that a contrary rule obtains. Aside from matters purely municipal, the constitution itself contemplates that matters may be provided for in a city charter within the sphere of the legislative or governmental functions of the state—matters falling within the domain of general laws; and yet, as to such matter, the only limitation is that if the legislature should thereafter step in and legislate upon the subject, a charter power would be suspended. But until the legislature did so interfere the charter power would prevail in the city. In California it is not the received construction that governmental powers not essentially appertaining to the government of a city are reserved by the state until delegated by the legislature by general law. The doctrine of the Supreme Court of the state of California, as announced in the case of People v. Williamson, (*supra*) is the exact reverse upon this subject.

> "If therefor the provisions creating the board of health are void because it is an attempt to surrender police powers which the state cannot abdicate then

> the entire charter must go. But this consequence would not follow even though the state were not authorized to make a final surrender of powers it holds for the benefit of all the inhabitants of the state. In such a case the law would not be void but would give way when the state found it necessary to exercise the same power for the preservation of the health of the people. In the case supposed the consequence would simply be that the charter would be found not to be beyond legislative control."

We call this court's attention to another feature of the case we are now discussing, which differentiates it from the case at bar.

In 1887, the general assembly of Missouri passed an act referred to as the "enabling act," the object of which, as the court says: "Was to provide the means for cities to avail themselves of that constitutional privilege and form their own charters." In that act there were two sections, one of which related to the control by the city over its highways and public places, and the other of which provided that it should be lawful for any such city, that is, a city having over 100,000 inhabitants, and desiring to frame a freeholders' charter for its government, in any such charter to provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or other public places of the city, whether such franchises or privileges have been granted by the city, or otherwise. This act did not include the conferring of any rate regulating power upon such city.

This so-called "enabling act" is analogous to the enabling act in the state of Washington which we re-

ferred to in discussing the Tacoma Gas and Light company. In 1889 Kansas City adopted its charter embodying therein the two sections referred to, *and also supplementing them by an additional provision authorizing the city to regulate the prices to be charged by telephone, telegraph, gas and electric light companies by ordinance.*

Therefore it might reasonably be held that the "enabling act" relating to the adoption of charters by certain cities having a population of 100,000 inhabitants was a general law of the state prior to the adoption of the city charter, and that the charter being subject to general laws, was controlled by the provisions of that act. And further that, since the act did not authorize a charter framed thereunder to regulate telephone rates in any city adopting the charter under the terms of the act, such power did not exist and had not been delegated to a city. The court, however, did not, like the Supreme Court of Washington, base its decision upon that ground.

It might also be said that, in view of terms of the enabling act referred to, it was the *declared policy* of the state of Missouri that the regulation of rates should not be delegated to municipal corporations operating under freeholders' charters, for the reason that while such cities could grant such franchises and regulate and control operations under them, the regulation of rates was intentionally omitted from the enabling act for the express purpose of withholding such power from cities. If this be the theory adopted by the Missouri Supreme Court, it would explain its decision on grounds that would of course indicate its construction of the constitu-

tion and laws of that state. But we maintain, and have endeavored to show that no such construction has been placed upon the scope of freeholders' charters in the state of California by its Supreme Court; and that under the constitution and laws of California the permission given in its constitution to a city "to frame a charter for its own government" are not to be confined within the limitations placed by the Missouri Supreme Court upon those words in the Missouri constitution.

The Missouri case cited in support of the proposition we are now considering is that of State v. Missouri and Kansas Telephone Company, 189 Mo. 83. The facts in that case were that the defendant telephone company was incorporated under the laws of Missouri in 1882, and ever since the date of its incorporation owned and operated a system of telephones in Kansas City. In 1889 Kansas City adopted its present charter, but the telephone company had already been planted in the city and doing business there several years before the charter was adopted. By a section of this charter it was provided that the city should have power by ordinance "to regulate the prices to be charged by telephone, telegraph, gas and electric light companies, and to compel them, and all persons and corporations using, controling or managing electric wires for any purpose whatever to put and keep their wires under ground, and to regulate the manner of doing the same." In September, 1902, Kansas City adopted an ordinance fixing the maximum rate to be charged by telephone companies for their service in that city.

The constitution of Missouri (Sec. 16, Art. IX) provides that:

> "Any city having a population of more than one hundred thousand inhabitants may form a charter for its own government, consistent with and subject to the constitution and laws of this state."

The court said:

> "A charter framed under that clause of the constitution, within the limits therein contemplated, has the force and effect equal to one granted by an act of the legislature.
>
> "But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the general assembly, because the constitution does not confer on the city the right, in framing its charter, to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality; yet, the legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers, the just exercise of which is essential to the happiness and well being of the people of a particular city; yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve, to be exercised by itself, or it may delegate them to the city; but until so delegated, they are reserved. The words in the constitution, 'may frame a charter for its own government,' mean, may frame a charter for the government of itself as a city, including all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants in the city as between themselves. Nor does the constitution confer unlimited power on the city to regulate by its charter all matters that are strictly local, for there are

> many matters local to the city requiring governmental regulation, which are foreign to the scope of municipal government. In none of the cases that have been before this court, bringing into question the charters of St. Louis and Kansas City under the constitution of 1875, have we given to this constitutional provision any broader meaning than above indicated. (Citing cases.)
>
> "The regulation of prices to be charged by a corporation entrusted with a franchise of a public utility character, is within the sovereign power of the state that grants the franchise, or that suffers it to be exercised within its borders, and that power may be with wisdom and propriety conferred on a municipal corporation; but it is not a power appertaining to the government of the city, and does not follow as an incident to a grant of power to frame a charter for a city government. The authority of Kansas City to insert in its charter the power to regulate the price to be charged for telephone service within the city is not conferred by the constitutional provision above quoted."

We call this court's attention to the fact that the charter of Kansas City containing the rate regulating provision was not adopted until long after the telephone company had received its franchise, and the rate regulating ordinance was not passed until three years after the charter itself was adopted. Since the Missouri court specifically refers to those facts it is evident that they must have had that consideration in mind, and that those facts entered somewhat into their conclusions.

We note that the constitution of Missouri does not declare that a freeholders' charter, when adopted, shall become the "organic law of the city," or supersede all special laws inconsistent with such charter, or that such charter shall be subject to and controlled by general

laws *except in municipal affairs.* All these things are declared in the constitution of California. When a charter becomes an *organic* act, it should be construed as all other organic laws are construed.

Another essential point of difference between the constitution of Missouri and the constitution of California on this subject of freeholders' charters, is that under the constitution of Missouri, it is provided that when adopted by the people of the city, it shall "become the charter of such city and supersede any existing charter, and amendments thereof," *without any further sanction.* In California, however, a freeholders' charter, before it becomes effective, *must be approved by the legislature.* So that a charter, when set in operation, does not only become a law by virtue of the act of the people in framing and ratifying it taken directly under constitutional authority, but it must have the sanction of the legislative department of the state government. The Supreme Court of Missouri seems to lay great stress upon the fact that the state, *by no act of its legislature*, conferred the rate regulating power upon Kansas City and that therefore the legislature, which is the only body that *could* confer it, not having acted such power had never been delegated by the state. But that consideration fails in California because here the legislature *does* have a vital part to perform in the matter of establishing a freeholders' charter for a city. In this connection we invite the attention of the court to the language of the California Supreme Court in the case of Fragley v. Phelan, (*supra*). We submit that if the delegation of the state's rate regulating power can only be effected by the

action of the legislature, even upon the theory of the Missouri case, the objection has no force on this case because the legislature has itself delegated the power by approving the charter. The approval of a freeholders' charter by the legislature under our constitution is not *creating* a municipal corporation *by a special law* in the sense forbidden by section 6, article XI of the constitution of California. The constitution expressly authorizes freeholders' charters to be separately framed for *any* city, and to be separately approved by the legislature. We submit that it logically follows that if the approval of the charter as a whole by the legislature is not open to the objection of special legislation, no power therein conferred is open to objection that it is void because not authorized by general law.

In the case of Lewisville Natural Gas Co. v. State, 135 Ind. 49, it appeared that by the statutes of Indiana power was conferred upon cities and towns to provide by ordinance reasonable regulations for the safe supply, distribution and consumption of natural gas. The town of Lewisville passed an ordinance prohibiting the Lewisville Natural Gas Company from charging more than one dollar per month for furnishing natural gas during certain months of the year. The Supreme Court of Indiana said:

> "There is not a word or a syllable to be found in this act indicating that the general assembly had in view any other purpose than that of securing the safe supply and use of natural gas. To secure the safe supply and use of natural gas is one thing and to fix the price at which gas shall be supplied is another and quite a different thing. In our opinion it was not the intention of the general as-

sembly to confer by the act set out the power to regulate the price at which natural gas should be furnished."

And the court quotes from Judge Dillon's book on Municipal Corporations, 4th Ed., Sec. 89, where he says:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no other:

"First: Those granted in express words.

"Second: Those necessarily or fairly implied in or incidental to the powers expressly granted.

"Third: Those essential to the declared objects and purposes of the corporation—not simply convenient but indispensable.

"Any fair reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied."

No principle declared in the foregoing case is involved here, for no power to fix rates at all was conferred upon the city of Lewisville.

The next case is that of State v. Sheboygan, 111 Wis. 23. In this case the city of Sheboygan conferred upon the common council authority to control its streets, *to make ordinances for the government and good order of the city and for the benefit of trade and commerce.* Under section 1778, of the statutes of 1898, originally enacted in 1848, any corporation formed under state law to build and operate telegraph lines (which was held to include telephone lines) was authorized to construct and maintain any such lines with all necessary appurtenances upon or along or across any public road, highway, etc., and from time to time to extend the same at pleasure.

In 1882, the relator, the Wisconsin Telephone Company, established an exchange in the city of Sheboygan. In 1899 the relator, desiring to extend its lines, filed with the common council a petition to extend its lines over certain streets and accompanied the same with a map showing the proposed location of its extensions. The city council refused to consent to the use of the streets along the proposed extensions unless the company would permit the telephone rate to be fixed and regulated by the city council, and consent to certain other restrictions in the exercise of the privilege. The company sought by a mandamus proceeding to compel the city to act on the petition, free from the restriction as to rates, etc., and the court directed that the demurrer to the return be sustained and the writ issued, holding that the power to fix rates assumed to be exercised by the city was a power inherent in the state, *and did not pass to the minor subdivisions thereof except by express grant or by necessary implication from other powers granted*, and upon the ground that the city of Sheboygan did not have, either expressly or impliedly, the power delegated to it by the state to fix rates for telephone service. All this is settled law, and in nowise affects the appellee's position in the case at bar. The facts in this case, as we have said of the preceding cases under the proposition we are discussing, shows that it is not in point. The city of Sheboygan simply did not have the power to fix rates conferred upon it in any manner.

Another case cited by counsel in this connection is Mills v. Chicago, 127 Fed. 731. This case also is not in point.

It was contended on behalf of the city of Chicago that it had the power to fix gas rates under a general statute of Illinois, authorizing cities to provide for lighting the streets; also to regulate the openings in streets for the laying of gas and water mains and pipes, provided that any gas company should have the right, by the consent of the council, to lay down pipes in the streets, etc., subject to such restrictions as any city might by ordinance impose; also, authorizing cities to pass and enforce all necessary police ordinances.

The court held that these provisions were not sufficient to enable the city to regulate the price of gas. It said:

> "A municipal corporation possesses only such power as is granted by the legislature in express words, or such as is fairly implied from powers expressly granted, or is essential to the specific object and purposes of municipal existence. No one has pretended that the regulation of the price of gas is essential to the specific object for which the city of Chicago was created; hence that source of possible power may be dismissed without further discussion."

The principle upon which this case was decided is that the regulation of the prices to be charged consumers by gas companies is not one of the powers essential to municipal government, and is not included in general powers conferred to cities; that such power cannot be exercised by a city unless it has been delegated by the state in express words, or by fair implication from a power expressly granted.

We do not dispute any principle upon which the case of Mills v. Chicago (*supra*) was decided.

The case of City of Noblesville v. Noblesville Gas Co., 157 Ind. 162, is not in point. By act of 1891 the legislature of Indiana had authorized the councils of cities having a population of 100,000 population in express words "to fix the price" of artificial and natural gas. The city of Noblesville was not such a city. The court said:

> "After a patient research we are unable to find any language in any act that fairly or reasonably imparts a purpose of the legislature to interfere with its (natural gas) commercial value, or to confer upon towns and cities of less than 100,000 population the power to do so, and must therefore hold that no such power exists."

The court quoted approvingly from Lewisville Gas Co. v. State (*supra*) and reaffirmed the principle on which it was decided. This case is exactly in line with Mills v. Chicago (*supra*) and goes no further. The city had power only to provide reasonable regulations for the safe supply, distribution and consumption of natural gas, and to require a reasonable license fee for granting the privilege of supplying such gas. (Laws of 1887.) The court said:

> "It would be doing violence to the rules of statutory construction to hold that under the law of 1887, the power of a city, when not reserved in a franchise, to prescribe prices chargeable by its licensee to consumers is free from a fair and reasonable doubt."

The city had power to provide for a gas supply for its inhabitants, but under law, as set forth in the opinion, the city only had power to make a contract for

that purpose "like any other matter." The city had granted the defendant the privilege of using its streets in 1888, with a certain fixed schedule of rates. In 1890 the city attempted to supplement the rates thus fixed by an ordinance covering service not specified in the ordinance granting the gas company its privileges. We perceive no point wherein this case is applicable to the case at bar.

We have thus reviewed in detail the series of cases cited by appellant's counsel (page 60 of appellant's brief), and we submit that none of them controls here, because the law and the facts upon which they turn are wholly at variance from any consideration of law or fact with which we are dealing in this case. And this significant fact appears, that so far as these cases bear upon the rate-regulating power, they, without exception, involve in some way, an attempt to fix rates under a power *assumed* or granted *after* a franchise had been granted. None of these cases holds that if the power to regulate rates is properly delegated it cannot be exercised.

## III.

**A telephone franchise, fixing maximum rates, granted by the City of Los Angeles, under the Broughton Act, does not preclude the City from exercising its charter powers over telephone rates.**

Counsel say (page 63 of appellant's brief) "that by the Broughton Act, it was also intended to authorize municipalities *to contract* as to rates, is upon all author-

ities, indubitable." That is not the point in this case. The essential question here is not the general one, whether a condition fixing rates in such manner as to constitute a contract as to the same, might not be inserted in a granchise granted under the *Broughton Act*. That act is not the only law involved in this case. At the root of this controversy is the question whether the mere specification of a maximum rate in a franchise granted under the Broughton Act by a city which has, at the time the franchise is granted, in express words embodied in its charter, the reserved power to "fix and determine" such rates "by ordinance," constitutes such a "contract" relative to rates as will preclude the city from exercising its charter power over such rates.

Counsel ask, "In what essential respect does the power given by that act to municipalities, respecting street railway and telephone companies, differ in respect to the power to agree upon rates from" that power as granted to certain cities in the cases cited in their brief (see pages 63 and 64 of appellant's brief).

We submit that an examination of each of these cases will disclose the fact that the power vested in each of the cities does differ in a very essential particular from that possessed by the City of Los Angeles under its charter in respect to telephone franchises. These cases all proceed upon an express statutory authority to contract as to rates, or an express authority to "provide" or "furnish" the city with a public utility granted to the local authorities in a manner that a contract as to rates is a necessary incident thereto and the only conclusion that can in reason be drawn therefrom. In

none of these cases do we find an unqualified delegation to and reservation by the city of the express power to regulate the particular rates under discussion.

It will be noted that neither the charter of the City of Los Angeles nor any law of the state of California authorizes the city "to provide for supplying the city or its inhabitants with telephones or telephone service." It has, therefore, no power in any business or proprietary capacity to construct or authorize the construction of telephone systems or to make any contract for that purpose. We submit that this must be true under the rules universally recognized in construing the powers of municipalities. The city is authorized to grant franchises and to impose conditions thereto under the Broughton Act. On principle, we perceive no reason why a freeholders' charter itself might not embrace a complete scheme for selling franchises under the constitution of California. Indeed the charter of San Francisco does contain just such provisions, and we are not advised that the validity thereof has ever been questioned.

A series of cases is cited by counsel (pages 63 and 64 of appellant's brief), and we will discuss them. We are convinced that they are so far dissimilar from the case at bar that an examination of them will disclose that they furnish no precedent that will control the final decision of the present controversy.

These cases are:

First: Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496.

This case involved the rights of the Vicksburg Water

Works Company, under the contract made between the city of Vicksburg and the company for furnishing the water supply of the city. The city of Vicksburg, by an act of the Mississippi legislature of 1886, was authorized "to provide for the erection and maintenance of a system of water works to supply said city with water and to that end to contract with a party or parties who shall build and operate water works." Acting under this authority the city of Vicksburg made a contract with defendant's assigns by which the latter should have the right to make the needful rules and regulations governing the consumption of water, the tapping of pipes and the general operation of the works and to make such rates and charges for the use of such water as they may determine, provided that such rates and charges shall not exceed 50 cents for each thousand gallons of water. The ordinance by its terms ran for thirty years; from November 18, 1886. The contract contained an agreement to pay a stipulated rental for certain hydrants for public use. In 1900 the legislature of Mississippi passed an act authorizing the city to issue bonds and to build a water works system of its own for the supply of the city and its inhabitants, and on the 3rd of July, 1900, an election was held in the city under the statute which resulted in a vote to build or buy a water-works plant of its own. The city repudiated any contract relations with the company. Thereupon the company filed its bill in the United States Circuit Court to restrain the city from assuming to abrogate the contract rights of the complainant and to avoid ordinances and resolutions in connection therewith.

After reviewing decisions upon the subject, the court concludes on page 515 of the report (206 U. S.) as follows:

> "In the light of these decisions, and others might be cited, we reach the conclusion that *under a broad grant of power conferring without restriction or limitation upon the city of Vicksburg the right to make a contract for a supply of water*, it was within the right of the city council in the exercise of this power to make a binding contract fixing the maximum rate at which water should be supplied to the inhabitants of the city for a limited term of years, and in the absence of a showing of unreasonableness 'so gross,' as the court of Mississippi has said, 'as to strongly suggest fraud or corruption,' this action of the council is binding and for the time limited has the right beyond legislative or municipal alteration to the prejudice of the other contracting party."

Second: Los Angeles v. Los Angeles City Water Co., 177 U. S. 558. The facts in this case are the following:

In 1868 the City of Los Angeles leased its waterworks for a specified sum to Griffin, and others, for a term of thirty years, and granted them the right to lay pipes in the streets, to take water from the Los Angeles river and to sell and distribute it to the inhabitants of the city, reserving the right to regulate the water rates, *provided that they should not be reduced to less than those charged by the lessees.* The lessees agreed to pay a fixed rental, to erect hydrants, and furnish water for public uses without charge; that at the expiration of the term to return the works to the city in good order and condition, reasonable wear and damage excepted. In

1870, the legislature of California passed an act in terms ratifying and confirming the contract. The municipal powers of the city provided under the act of incorporation, among other things, were:

> "To make by-laws or ordinances, * * * to make regulations to prevent and extinguish fires, * * * to provide for supplying the city with water."

(We call the court's attention to the fact that at the time this contract was made charters of cities in California were granted by special act of the legislature, and freeholders' charters did not exist until the constitution of 1879 was adopted.)

The court held that the power of the city to regulate rates was an existent power, not granted by the contract but reserved from it with a single limitation, the limitation being that it should not be exercised to reduce rates below what was then charged; that undoubtedly there was a contractual element, but that it was not in granting the power of regulation, but in the limitation upon it.

The contention of the city was based upon the distinction that the contract was made by the city in its *proprietary* capacity, and that it had the power to regulate rates, notwithstanding the contract, in its *municipal* capacity, but the court said:

> "To have limited the right of regulation to the city in one capacity and left it unrestricted in the other would have been useless, and such intention cannot be attributed to the parties."

This court affirmed the judgment of the Circuit Court annulling the ordinance of the city regulating its rates on the ground that it impaired the obligation of this contract.

It will be perceived, therefore, that the express power was conferred upon the city to "provide for supplying the city with water" which the city could exercise in its proprietary or business capacity, and the contract made thereunder, afterwards confirmed by special act of the legislature, was upheld as such. In the case at bar, however, the granting of the franchise and the fixing of rates are both legislative, and the power to grant the franchise and the power to regulate rates are co-existent.

Third: Walla Walla v. Walla Walla Water Company, 172 U. S. 1.

This was a case where the city of Walla Walla by section 11 of its charter was given power "to provide * * * a sufficient supply of water, also to erect and maintain waterworks within and without the city, or to authorize the erection of the same for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water * * * and to enact all ordinances and regulations necessary to carry the power conferred into effect." The city was authorized to "adopt proper ordinances for the government of the city," and to carry into effect the powers given by this act (i. e., the incorporation act). It was further provided in the incorporation act that the city should have such other powers and privileges not therein specifically enumerated as incident to municipal corporations.

In 1887, the city of Walla Walla by ordinance of its council and in order to secure a supply of water granted the defendant company for the period of twenty-five years the right to lay and maintain all necessary pipes, etc., in the streets of the city for the purpose of furnishing the inhabitants thereof with water. The water company accepted the ordinance and entered into a formal contract with the city and complied with all of the terms and conditions of the contract which had never been avoided by the city or the courts. In 1893 the city attempted to take proceedings to provide for the construction of a system of waterworks of its own, regardless of the contract previously made with the company, which by this action sought to enjoin the erection and maintenance of such municipal system of waterworks. Here again we submit that there is no analogy to the facts involved in the case at bar. Under its proprietary power to provide for supplying itself and its inhabitants with water, expressly granted, it made a contract to do so, and this was construed to preclude the city, while that contract was in force, from its constructing a system of waterworks. We submit that this case does not come within any principle deducible from the Broughton Act taken in connection with the legislative power to regulate rates conferred by the charter of Los Angeles.

Fourth: The cases of Cleveland v. Cleveland Railway Company, 194 U. S. 517; Omaha Water Company v. City of Omaha, 147 Fed. 1, and State v. Laclede Gas Light Company, 102 Mo. 485, are considered elsewhere in this brief, but the same fundamental distinc-

tion lies between those cases and the one at bar that we have herein pointed out in the preceding cases.

Fifth: The case of Santa Ana Water Company v. Town of San Buena Ventura, 56 Fed. 339, cited by appellant, presents a situation similar to many of the cases relied upon by appellant to support its contract theory. Here the act of the legislature of March 10, 1866, incorporating the town, conferred upon the trustees of the town power to supply it with fresh water and to provide for the prevention and extinguishment of fires. The board of trustees entered into a written contract with one Arnez and others. By this contract Arnez and his associates agreed to erect a dam in the San Buena Ventura river and furnish to the town sufficient water for public use in case of fire and for public fountains at such prices as should be agreed upon, and the town agreed to permit Arnez and his associates to fix such rates for the supply of water to private persons as they should deem expedient, and use the streets of the city for the laying of the necessary pipes. In 1872 the board of trustees passed an ordinance ratifying and approving the terms of said contract to the Santa Ana Water Company, as assignee, and in 1876 the legislature approved said ordinance. In 1892 the town council passed an ordinance prescribing a maximum water rate for supplying water to the town and its inhabitants pursuant to the authority granted to the trustees of any town by section 1 of article 14 of the constitution of 1879, and the court held that at the time of the execution of the contract of 1868 there was no existing law reserving to the state or municipality the power to fix

the water rates which the town through its board of trustees contracted should be fixed by Arnez and his associates, and that said contract could not be impaired by subsequent legislation.

There is nothing here, we submit, that aids appellant.

Sixth: Reliance is also placed upon the case of City of Bessemer v. Bessemer Water Works. In that case it appeared that the power of the city in respect to supplying it and its inhabitants with water was found in a section of its charter reading as follows:

> "The mayor and aldermen of the city of Bessemer shall have full and ample power, jurisdiction and authority * * * to make, erect and repair public wells, cisterns, and establish fire plugs and hydrants, and to make all needful provision by contract, ownership of waterworks, or otherwise, for the supply of the city and the citizens thereof with water; and the board of mayor and aldermen shall have the power to regulate and prescribe the quality of water to be furnished, the rates to be charged therefor to the city and to private citizens and consumers within the city limits, and to pass all such by-laws, resolutions and ordinances as may be necessary and expedient to this end. * * * Provided that the rates for water * * * that may be prescribed shall be reasonable."

This grant of power was made in 1900. The company was incorporated in 1890, "And at once began to supply the city and its inhabitants with water through a system of waterworks owned and operated by it." It does not appear what powers the city had with reference to regulating the charges for water rates at the time the company began its operation in the city.

In 1904 negotiations began between the company and the city for the improvement of the company's system and the betterment of its water supply. The city proposed that if the company would improve its system the city would enter into a contract with the company to supply the city and its inhabitants with water for thirty years. The result of the negotiations was an ordinance contract entered into August 20, 1904, which required an acceptance and ratification of its provisions on behalf of the city and authorized the mayor to execute the contract on behalf of the city. The contract provided, among other things, the maximum rates at which water should be supplied which were fixed by the terms of the contract, and the contract, in reference to its duration provided that the term thereof should be thirty years from the date the contract went into force, during which time all the provisions of the contract should be binding on the parties thereto.

It was contended that the power and authority was conferred on the mayor and aldermen to regulate and prescribe the rates to be charged for water by such by-laws, resolutions and ordinances as may be necessary and expedient, and that the contract was made in reference to it, the argument being that such power and authority was in legal effect inserted in the contract and that the rates therein designated as maximum rates are subject to change at any time by the board of mayor and aldermen with a limitation upon the power of that board that the rate should not be unreasonable. The court said:

"If the company had notice of the power to fix

rates it also had notice of the city's authority to contract in reference to rates if such power existed. Cannot operation be found for the power to regulate rates without its conflicting with contract rates? We think it can. * * * We cannot see that the power to fix rates given in the same section of the charter should be held to be an inhibition of the city's power to contract rates if such power to contract can be necessarily implied from the power to contract for the supply of water; and our conclusion is that the right of the city to fix maximum rates if not expressly given arises by necessary implication from the language in which the charter power to contract is clothed."

City of Bessemer v. Bessemer Water Works, 40 So. 622 (Ala. 1907).

Here, again, the distinction between the authority to make a *contract* as to rates, found by the Alabama Supreme Court, and the fixing of rates by legislative actions expressly reserved to the city by existing law is clearly perceptible.

The case of State v. Laclede Gas Light Co., 102 Mo., is also relied upon by appellant. The salient facts in this case are somewhat complicated, but they appear to be the following:

1st. The St. Louis Gas Company was a corporation, organized by special charter granted by the state, with an exclusive franchise to make and vend gas in a certain portion of the City of St. Louis with the right and power to charge for gas which it might make and vend, *such prices as it might agree upon with consumers,* not exceeding ten dollars per thousand cubic feet. The company ~~of~~ and the city of St. Louis had power, under the act creating this corporation, to contract for and make

regulations relating to the lighting of the city with gas in such manner as they might agree upon, and generally to make such contracts as might be beneficial to the company and the public.

2nd. The Laclede Gas Company existed by virtue of a special charter granted by the state March 2nd, 1857, which charter, as subsequently amended, gave it the power to contract and be contracted with without condition or limitation. It was authorized, throughout a certain portion of the corporate limits of the city of St. Louis, to lay its pipes and fixtures and make and vend gas with no condition or limtiation as to the price to be charged therefor, and it was granted all powers necessary to execute and carry out the privileges and powers granted to it. The corporation was exempt from subsequent legislative interference by special provision to that effect.

3rd. In 1873 an agreement was made between the city of St. Louis and these two gas light companies to continue in force until January 1, 1890, which was the date of the expiration of the charter of the St. Louis Gas Light Company by which it was agreed that the St. Louis Gas Light oCmpany had the exclusive right, in a large part of the city of St. Louis, to sell gas to said city and to any and all other persons, at and for any price and sum it might agree upon with its consumers, not exceeding a certain maximum.

4th. In the month of January, 1886, the St. Louis Gas Co. and the city, being mutually desirous of obtaining modifications of the agreement of 1873, such modifications on the part of the company being such as would

give an enhanced salable value to its works, plant, etc., at the time of the expiration of its charter, and as would also be assignable by it to another corporation organized for the purpose of manufacturing and vending gas, and the city on its part being desirous of obtaining a reduction of gas rates; and

5th. That thereupon a franchise was granted to the St. Louis Gas Light Company, containing, among other things, a provision that the price of gas until January 1, 1890, should not exceed $1.50 for each one thousand cubic feet, and from January 1, 1890, to January 1, 1920, it should not exceed $1.25 for each one thousand cubic feet, and that the company, its successors and assigns, would grant to the consumers a reduction of 5 per cent, after January 1, 1890, from the price above named on bills paid within five days, "or a net price of $1.18¾ cents per thousand cubic feet for gas paid for within said time." Another section of the ordinance provided for the transfer and conveyance to a corporation, organized under the laws of Missouri, authorized to manufacture and vend gas, all the plant and property of the St. Louis Gas Company, together with, all and singular, the powers, rights, and privileges and franchises conferred upon the St. Louis Gas Co., by the ordinance. Further provision was to the effect that the grantee thereof should be subject to all the conditions and provisions of the ordinance and comply with and perform all the agreements and obligations and duties imposed by the ordinance upon such grant.

6th. On December 24, 1889, just a week before the expiration of the charter of the St. Louis Gas Co., it

sold all its rights and privileges to the Laclede Gas Co., which thereby assumed the rights, privileges and obligations of the St. Louis Gas Co., under the ordinance referred to.

7th. Subsequently thereto the city of St. Louis passed an ordinance for the regulation of gas rates, providing that the price of gas in the city of St. Louis to consumers should not exceed 90 cents per one thousand cubic feet for the term of five years, and making it a misdemeanor for any corporation or officers thereof to charge, collect or receive any sum in excess of the rates fixed by the ordinance.

8th. In 1870 the power to regulate the price of gas was granted by the state to the city, whether by act of the legislature or by amendment to the city charter, does not appear.

This *resume* of the facts in this case we submit, as it is sufficient to show that the case is in no sense an authority aplicable here. The effect of the decision therein we understand to be simply this: The Laclede Gas Co., having been authorized by its charter granted by the state to make and vend gas in the city of St. Louis under a franchise authorizing it *to contract and be contracted with, without condition or limitation*, and giving it power to make and vend gas *with no condition or limitation as to the price to be charged therefor*, its charter was not subject to subsequent alteration, amendment or repeal, and the company could not thereafter, by any ordinance of the city of St. Louis, be required to furnish gas at any other price than that designated in the contract between it and the city, specifying the rates to be

charged by the company. It is to be noted that *at the time the corporation was organized, and for thirteen years thereafter, there was no power in the city of St. Louis to regulate the price of gas.* There are at least two fundamental points of difference between that case and the case at bar. Here, for more than twelve years before appellant's franchise was granted to it, the charter of the City of Los Angeles had authorized its council by ordinance to fix and determine telephone rates and that provision was in full force and effect when such franchise was granted to appellant. Furthermore, there is no express power conferred by law upon the appellant to "contract and be contracted with without condition or limitation." Nor is there any power conferred by legislative authority upon the appellant to furnish telephone service without condition or limitation as to the price to be charged therefor. We submit that the Laclede Gas Light Co. case simply presents a modern instance of application of the doctrine declared early in the history of this court in the Dartmouth College case.

In the Laclede Gas Company's case the court said that legislatures and municipalities could not "in the exercise of *assumed* police powers violate charter contracts and overthrow vested rights." The powers attempted to be exercised by the city of St. Louis in this case could very properly be said to be "assumed" police powers, since it nowhere appears that the city of St. Louis had any legislative power to fix and regulate the price of gas prior to 1870. The rights of the Laclede Gas Company had been vested many years before the city of St. Louis

was granted the power to fix and regulate the price of gas by its charter.

IV.

**The appellant acquired its franchise with notice of the city's charter power under Section 31, and that such power might be exercised at any time.**

The appellant took its franchise, exhibit "B," subject to all laws in force in the City of Los Angeles at the time the same was granted. Section 31 of the city charter empowering the city to regulate rates for telephone service was in force at that time and had been in force since 1889. The appellant therefore acquired its franchise with notice that Sec. 31 of the charter was embodied in the organic law of the city and was a power that might at any time be exercised by the city. The city did exercise this power by the passage of ordinances "C," "D," and "F," and the appellant cannot question the authority of the city to exercise this power unless the city has concluded itself "by the use of clear and unequivocal terms." This the city did not do by ordinance "B."

City of St. Louis v. United Railways Company and St. Louis Transit Company (No. 493); same, v. St. Louis & Suburban Railway Company (No. 154), and same v. St. Louis and Meramec River Railroad Company, (No. 195), U. S. Supreme Court Advance Sheets No. 14, June 15, 1908, pp. 616 to 689.

In the above cases, which were considered together, Mr. Justice Day delivered the opinion of the court and said in part:

> "These cases were submitted together and involve the effect of certain ordinances of the city of St. Louis, which are alleged to be binding contracts, protected by the Federal Constitution.
>
> "A bill was filed in the Circuit Court of the United States for the Eastern District of Missouri by the United Railways Company of St. Louis and the St. Louis Transit Company, the former being the lessor and the latter the lessee of a large system of street railways in the city of St. Louis. The bill seeks to enjoin the enforcement of a certain ordinance, No. 21,087, in the city of St. Louis, passed March 25, 1903, alleging violation of the contract clause of the Constitution and of rights secured by the 14th amendment. The case was tried upon the bill, answer replication, and an agreed statement of facts.
>
> "The complainants are the owners of certain rights granted by ordinances to a number of street railway companies in the city of St. Louis, the assignors of the complainants. These ordinances are set out in the record and are quite numerous. Some of them cover quite extended terms, running as long as forty and fifty years. They purport on their face to grant to the railway companies named in the ordinances, their licensees, successors, and assigns, rights in certain streets 'to operate, maintain, and construct,'—'to lay down, construct, operate, and maintain,'—'to reconstruct its tracks and maintain and operate its railway thereon.' The grants in these ordinances are in consideration of certain undertakings and obligations stated therein on behalf of the railway companies, which are thus epitomized in the opinion of the learned judge in the case in the Circuit Court: (1) To commence and complete the work of laying down the tracks and installing the road within certain specified periods.

(2) To grade the streets from curb to curb. (3) To construct and keep in repair that portion of the street lying between the tracks and 12 inches outside thereof. (4) To cause cars to be run day and night at certain intervals named in the ordinances. (5) To pay certain stipulated sums of money, or certain percentages of the gross earnings of the several companies, to the city each year during the continuance of the privileges specified in the contract.

"At the time these ordinances were passed there was in force in the state of Missouri a certain provision of the state Constitution, namely:

"'No law shall be passed by the general assembly granting the right to construct and operate a street railroad within any city, town, village, or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad; and the franchises so granted shall not be transferred without similar assent first obtained.' (Art 12, par. 20.)

"The city charter of St. Louis contains, among others, the following provisions:

ARTICLE 10.

"'Sec. 1. Authority of municipal assembly in reference to street railroads; may sell franchises or impose a per capita tax or a tax on gross receipts. The municipal assembly shall have power by ordinance to determine all questions arising with reference to street railroads, in the corporate limits of the city, whether such questions may involve the construction of such street railroads, granting the right of way, or regulating and controlling them after their completion; and also shall have power to sell the franchise or right of way for such street railroads to the highest bidder, or, as a consideration therefor, to impose a per capita tax on the passengers transported, or an annual tax on the gross receipts of such railroads, or on each car,

and no street railroad shall hereafter be incorporated or built in the city of St. Louis except according to the above and other conditions of this charter, and in such manner and to such extent as may be provided by ordinance.'

"There was also in force in the city charter of St. Louis, article 3, Par. 26, Subd. 11, which empowers the city, through its mayor and municipal assembly:

" 'Eleventh.—To protect rights of city in corporations; grant, regulate, and repeal railway franchises; free passes on street railways prohibited.—To take all needful steps in and out of the state, to protect the rights of the city in any corporation in which the city may have acquired an interest; to have sole power and authority to grant to persons or corporations the right to construct railways in the city, subject to the right to amend, alter, or repeal any such grant, in whole or in part, and to regulate and control the same as to their fares, hours and frequency of trips, and the repair of their tracks, and the kind of their rails and vehicles; but every right so granted shall cease unless the work of construction shall be begun with one year from the granting of the right, and be continued to completion with all reasonable practical speed, and it shall be the cause of forfeiture of the rights and privileges derived from the city of any railroad company operating its road only within this city, which shall allow any person to ride or travel on its road gratuitously or for less than usual price of fare, unless such person be an officer or employe of such company.'

"The 5th subdivision of par. 26 of article 3, clause 5, confers upon the mayor and assembly the power to license, tax, and regulate certain occupations and kinds of business, vehicles, conveyances, etc., among others, street railway cars. As appears from agreed statement of facts, at the time the ordinances granting rights to the street railways were passed there were sections of the municipal code of St. Louis

(2134 *et seq.*) in force requiring the street railway companies to pay to the city collector an annual license fee of $25 for each and every car used by them in transporting passengers for hire in the city. These sections were passed under the power conferred to license, tax, and regulate occupations, vehicles, and street railway cars.

"The ordinance which is the subject matter of this controversy is No. 21,087, purporting to impose a tax equal to one mill for each pay passenger on each car, and purporting to be an amendment of the section of the municipal code fixing the license tax at $25 per car. It is stipulated in the agreed statement of facts that all the railway companies named in the complaint, including the United Railways Company and the St. Louis Transit Company, paid the annual license of $25 per car until the going into effect of ordinance 21,087.

"This case was decided by the learned judge of the Circuit Court upon the theory that the power of the city to give its consent to the use of the streets for the purpose of constructing and operating railroads and the power to license street railway cars, were both exercised in the specific ordinances in question, and that, in fixing the compensation to be paid by the railway companies, an irrevocable contract was made which prevented the city, during the terms of the ordinances, from imposing any license fee or tax for the operation of the cars; for, says the learned judge:

" 'There is neither statutory command nor any perceptible reason why both these powers should not be exercised in one and the same ordinance, and such, in my opinion, is the obvious purpose of the original ordinances granted to complainants' assignors.

" 'The right "to construct and operate" is conferred in terms admitting of no doubt. The license, which is essentially an occupation tax, is, in my opinion also fixed in each of the ordinances. The several original ordinances or contracts clearly

mean that the city exacted, among other things, certain quarterly or yearly payments of money to be made to it by the railroad companies as a consideration for the grant by it of the right to occupy and use its streets for the purpose of laying down, maintaining, and operating railroad tracks thereon. The law nowhere commands that the license fee, as authorized by the 5th subdivision in question, shall be for annual or other terminal occupation. And I perceive no reason why the city may not at the outset fix such a license for the full term of its grant. This is what I think it did in and by the terms and stipulations of the several ordinances in question.'

"The theory, then, upon which the bill was framed and this case decided, was that the city having once fixed a price for the use of its streets, which the railway companies had agreed to pay, there was no right to impose a license tax upon the railway companies under the ordinance of March 25, 1903, amending the municipal code in the manner already referred to. These sections of the municipal code, requiring the payment of the license fee, impose a tax, as the main purpose of their enactment is the raising of revenue. St. Louis v. Spiegel, 75 Mo. 145, 146.

"The principles involved in this case have been the subject of frequent consideration in this court, and while it can be no longer doubted that a state or municipal corporation, acting under its authority, may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or license fees, at the same time the principle has been established that such deprivation can only follow when the state or city has concluded itself by the use of clear and unequivocal terms. The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption. The section of the Missouri Constitution, and the laws to which we have referred, clearly show that while the franchise of the corporation essential to its existence is derived from the state, the city retains the

control of its streets, and the use of them must be acquired from the municipal authorities upon terms and conditions which they shall fix.

"Blair v. Chicago, 201 U. S. 400, 50 L. Ed. 801, 26 Sup. Ct. Rep. 427.

"An examination of the cases in this court shows that it is not sufficient that a street railway company has agreed to pay for the privilege of using the streets for a given term, either in a lump sum, or by payments in installments, or percentages of the receipts, to thereby exclude the municipality from exercising a statutory authority to impose license fees or taxes. This right still exists unless there is a distinct agreement, clearly expressed, that the sums to be paid are in lieu of all such exactions. * * *

"Applying these principles to the ordinances in question, we do not find in them any express relinquishment of the power to levy license tax which is the subject-matter of this controversy. * * *

"No ordinance contains any express relinquishment of the right to exact a license fee or tax. It is true that the city, in granting the right to use the streets by special ordinance, and in exercising by general ordinance the right conferred in the charter to impose a license tax upon cars, is dealing with rights and privileges somewhat similar, but, nevertheless, essentially separate and distinct. In the special ordinances the city is making an arrangement with the railway company to confer the right to use the streets in consideration of certain things the company is to do by way of operation and otherwise, including, it may be, payment of fixed sums or a proportion of receipts in consideration of the rights and privileges conferred. The city does this by virtue of its power to grant rights and privileges and control their exercise in the streets of the city, —power expressly conferred in the charter of the city.

"In the fixing of a license tax upon all companies alike for the privilege of using cars in the city,

*it is exerting other charter powers.* It makes provisions uniformly applicable to all persons or companies using street cars. It is a revenue measure equally applicable to all coming within its terms. We do not perceive that the exercise of the power to grant privileges in the streets in making terms with companies seeking such rights, in the absence of plain and unequivocal terms to that effect, excludes the city's right to impose the license tax under the power conferred for that purpose.

"How, then, stands the case? Is it true that because the city has required and the company has agreed to pay certain sums fixed in amount, or based on the receipts, for the use of the streets, that it has hereby deprived itself of the power to exercise the authority existing at the time the ordinances were passed to license street railway cars, and in the exercise of that power, to charge a license fee or tax? At the time when the several ordinances were passed the city of St. Louis had the right, under its charter, to grant the use of the streets for the use of the company, upon the terms which are named in such ordinances. It also had authority under another provision of its charter to require a license fee on certain vehicles, including street railway cars. There was in force a section of the municipal code asessing this license charge at $25 per annum for each car. (This is the code which has been amended by No. 21,087, in controversy.) It is stipulated that, until the passage of the last-named ordinance, the railway companies paid the license fee without objection. It is said in the opinion of the learned judge below that the tax, equal to one mill for each paid passenger, amounts to a tax of 2 per cent on the gross receipts, and is, therefore, an increase on what the company had theretofore agreed to pay. But the tax is not levied on the gross receipts as such, and any license tax, in whatever sum imposed, would take something from the gross receipts of the company.

"It seems to us that this case is virtually decided

by the rule laid down in New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 36 L. Ed. 121, 12 Sup. Ct. Rep. 406, which holds that because a street railway company had agreed to pay for the use of the streets of the city for a given period, it does not thereby create an inviolable contract which will prevent the exaction of a license tax under an acknowledged power of the city, unless this right has been specificaly surrendered in terms which admit of no reasonable interpretation.

"We are of the opinion that an application of settled principles, derived from the decisions of this court, shows that these ordinances do not contain any clearly-expressed obligation on the part of the city surrendering its right to impose further license fees or taxes upon street railway cars, and we are of the opinion that the learned Circuit Court erred in reaching the contrary conclusion, and in granting a decree perpetually enjoining the enforcement of the ordinance in controversy.

V.

**The rates and charges of telephone companies for service and connections embodied in a franchise are subject to change thereafter by the City of Los Angeles, in the exercise of its charter power to regulate and fix such rates and charges and this is a continuing power.**

Counsel for appellant contends that the charter expressly confers the power upon the city to fix and determine rates *for a definite period*, and places no limitation upon the period. (See pages 69 and 70 of appellant's brief.) What is the real meaning of the phrase "the council shall have power, *by ordinance*, * * * to fix and determine the charges for telephones and telephone service and connections"? The construction to

be placed upon these words contained in section 31 of the Los Angeles charter, is a crucial matter. They were placed in the charter long before the franchise in question was granted, long before the Broughton Act was passed, and appellant took its franchise with notice thereof. In determining the legal effect of the maximum charge clause of the franchise, we must take into account, not only the Broughton Act, but also the charter provision. The rule of statutory construction applies with full force:

> "Contracts are presumed to have been entered into with reference to the laws then in force, which therefore are to be deemed as forming a portion of their essence, and with reference to which they are to be construed."
>
> Endlich, Construction of Statutes, Sec. 274;
>
> Stohr v. San Francisco M. F. Society, 82 Cal. 557;
>
> Pignaz v. Burnett, 119 Cal. 157, 160.

This principle of construction is elemental, and we invoke it here. The courts of California have never passed upon the validity of section 31 of the city charter, consequently the construction to be placed upon, and its effect upon, a franchise granted under the Broughton Act is a new question, to be determined here without the aid of previous rulings by the courts of California.

We are not without a precedent, however, upon the proposition we are here considering. We refer to the case of Freeport Water Company v. Freeport, 180 U. S. 587. Counsel for appellant do not discuss this case, but its bearing upon the case at bar was so clearly em-

phasized by the circuit judge below in his opinion, and it is so manifestly applicable that we invite the attention of the court thereto. The case cited was followed by two others, in which the same questions were involved, and also decided at the same term of court, to-wit:

Danville Water Co. v. Danville, 180 U. S. 619;
Rogers Park Water Co. v. Fergus, 180 U. S. 624.

The Freeport case is an authority here upon two points to which appellant's counsel have devoted considerable attention.

First: Whether the prescribing of maximum rates in an ordinance granting a franchise under the Broughton Act constitutes such contract relative thereto, that a reduction thereof thereafter by ordinance under the authority of section 31 of the charter would be invalid as an impairment of a contract obligation.

Second: Whether the rate regulating power conferred upon the city in specific language, the same to be exercised *"by ordinance,"* is a continuing, governmental power, to be exercised by the council from time to time as in its judgment may be necessary, irrespective of the maximum charges specified in the franchise granted under the Broughton Act.

It will be observed that the section of our charter in which this rate regulating power is conferred contains no provision that could be construed as contemplating that anything therein authorized could be done by *agreement* or *contract*. There is no reference, express or implied, to any act or thing of a contractual nature. The rate regulating clause is not linked to, or coupled with,

or associated with any other clause, providing for the exercise of powers on the part of the city by contract or agreement, or from which the exercise of power by contract might be inferred. The rate-carrying clause stands out as expressing a separate, independent legislative function. We have already said that the city has no power in its charter, as a municipal corporation, and at its own instance, to provide a system of telephones for the benefit of its inhabitants. Neither is there any *implied* power to do so. There is no power to make an *agreement* as to telephone rates, and, in the absence of necessary authority, none will be implied.

In the Freeport case it appears that an act of the legislature of Illinois was passed in 1872, providing as follows:

> "The city council * * * shall have power to provide for a supply of water * * * for the construction and regulation of * * * water-works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years."

In 1882 the city of Freeport enacted an ordinance granting to certain persons the exclusive right and privilege for the term of thirty years to furnish water "suitable for domentic and manufacturing purposes." The franchise contained provisions requiring the grantee to erect fire hydrants to be paid for by the city at a stipulated rental. The city was given the right to use water free of charge from the hydrants on the streets for flushing and washing the gutters and for flushing any and

all sewers; also water free of charge for the use of the fire department.

> "Maximum rates to consumers were fixed, for the purposes which were specially enumerated in it."

In 1896 the council passed an ordinance to the effect that the "Freeport Water company, a corporation" (naming it) should be entitled to charge and receive for water the rates and prices thereinafter fixed, and no more. The ordinance established in detail maximum rates for water to be furnished for domestic and manufacturing uses, and other uses furnished without meter, and there was a penalty for charging a greater rate than those established. This court referred to a previous decision of the Supreme Court of Illinois, to the effect that the state court had construed the statute as meaning that the supply of water could be made for the entire term, but that the *price is to be determined from time to time.* This court said that it did not necessarily have to follow the decision of the state court:

> "We decide for ourselves the fact of contract—not only its formal execution but its legal basis in law, and therefore construe for ourselves the statutes of the state upon which it is claimed to rest."

Conceding that the statutes were ambiguous, this court followed the Illinois court in resolving the ambiguity in favor of the public under a rule declared in many cases, and used the following language:

> "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equiva-

lent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. ed. 939, 955, its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear. This rule is elementary, and the cases in our reports where it has been considered and applied are numerous.

"These remarks are obviously applicable to the Illinois statutes. The question is whether the power given to the municipalities of the state was to be continuing or occasional, indeed only special in its purpose, intended to have but one exercise, and then bound in contract for thirty years. If the latter had been the intention it would have been natural to express it. The fullness of sovereignty can be taken for granted, and naturally would be and should be taken for granted. An example is afforded by the act of June 6, 1891. By that act the corporate authorities of any city which have authorized or shall authorize any individual, company, or corporation to supply water, 'be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company, or corporation. * * *' There is no explicit provision for repetitions of the power,—none declaring the power conferred a continuing one. Who now doubts that it is? If rights were claimed and were pleading for a different interpretation, we might have to listen to them, but now, undisturbed by them, we yield without resistance to that meaning which the subject-matter demands in the absence of negativing words.

"Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain waterworks 'at such rates as may be fixed by ordinance, and for a period

> not exceeding thirty years.' The words, 'fixed by ordinance,' may be construed to mean by ordinance once for all to endure during the whole period of thirty years; or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time."

One more point involved in that case is worthy of note here. In answer to the contention that the establishment of rates is legislative and not a judicial act, and that therefore the power to review and determine them given by the statute to the circuit court is void, this court, among other things, said:

> "Of the second ground it is only necessary to say that the statutes of 1872 gave to the city the power to fix the rates. It became a condition, therefore, of the privileges granted to plaintiff."

The Freeport case, is, we submit, a authority upon these propositions:

*First:* The mere statement of maximum rates in a franchise does not of itself constitute a contract as to rates.

*Second:* The power reserved in an existing statute under which the franchise is granted to regulate rates *by ordinance*, is a coninuing power to be exercised from time to time, and must be so construed; even if there is a reasonable doubt, such construction must prevail.

*Third:* The power to fix rates, reserved in the statute under which a franchise is granted, is a *condition* to the franchise itself, even if it be not reserved therein.

The fixing of rates of public service corporations is unquestionably a legislative act, and any action on the part of the City of Los Angeles to fix the rates of the appellant corporation, is in the exercise of its legislative function under the charter.

Judge Cooley, under the head of Irrepealable Legislation, said:

> "Equally incumbent upon the state legislature and these municipal bodies is the restriction that they shall adopt no irrepealable legislation. No legislative body can so part with its powers by any proceeding as not to be able to continue the exercise of them. It can and should exercise them again and again, as often as the public interests require. Such a body has no power, even by contract, to control and embarrass its legislative powers and duties. * * * In this way the legislative powers essential to the comfort and preservation of populous communities might be frittered away into perfect insignificance. To allow rights thus to be parcelled out and secured beyond control, would fix a principle by which our cities and villages might be broken up."
>
> Cooley on Constitutional Limitation, 7 Ed., p. 295.

A common council, having by statute, power to regulate fares, cannot give a street railway power to charge a certain fare, so as to prevent future councils from exercising the power by changing the rate.

Milhau v. Sharp, 17 Barb. 435.

> "This power of regulation is a power of government continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalant. If there is a reasonable doubt, it must be resolved in favor of the existence of the power. In

the words of Chief Justice Marshall in the case of Providence Bank v. Billings, 4 Pet. 514-561, 'Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been considered and applied are numerous."

Stone v. Farmers' Loan & Trust Co., 116 U. S. 307;

Owensboro v. Owensboro W. Co., 191 U. S. 370.

As to the unconstitutionality of a statute of the state of New York, requiring a street railway company in the city of Buffalo to charge a fare less than that authorized by the charter of the company, Chief Justice Ruger, speaking for the New York Court of Appeals, says:

"The same authority which confers upon one body the power of legislation, authorizes its successors, in the exercise of their duty, to change, alter and annul existing laws, when, in their judgment, the public interest requires it. In the performance of their duties of legislating for the public welfare, each successive body must, from necessity, be left untrammeled, except by the restraints of the fundamental law; and when called upon to act upon subjects which concern the health, morals or interests of the people, as affected by a public use of property for which compensation is exacted by its owners, they are unlimited by any constitutional restraint."

Buffalo East Side Street Ry. Co. v. Buffalo Street Ry. Co., 2 L. R. A. 384.

A municipal corporation has no power to limit its legislative discretion, by covenant.

Brick Presbyterian Church v. The Mayor of New York, 5 Cow. 538.

The power, then, of the City of Los Angeles to fix telephone rates, is a continuing one, and the city is not bound, to refrain from the exercise of that power in the matter of readjusting, by ordinance, the rates which had been prescribed in its franchise. Even if it had been the express intention of the city council to fix rates once for all, to be charged by appellant, such action on the part of the city council would amount to the abrogation of a chartered power, which is impossible under any circumstances here appearing.

VI.

**A condition in a franchise, merely fixing maximum rates, does not of itself constitute a contract as to rates, unless the legislative intent that the condition shall have such effect is clear and unmistakable.**

Counsel for appellant advance the proposition (page 97 of appellant's brief) that the terms and conditions set forth in section 9 of its franchise, constitute a contract as to rates—evidently meaning that the agreement is that they may charge any rate up to the maximum, *because a maximum is fixed* in the franchise. Whether the specification of maximum rates constitutes a contract that would preclude the legislative authority from interfering, is always a question that must be determined with the aid of other facts and circumstances surrounding the case. It cannot be said that the mere fixing of maximum rates constitutes such a contract.

Georgia Banking Co. v. Smith, 128 U. S. 178.

178.

We are referred to a list of authorities (page 97 of appellant's brief) which counsel urge support their contention, in that it is in line with the principles decided and illustrated in those cases. Some of them we have discussed elsewhere in connection with our review of the authorities cited at page 60 of appellant's brief. All of them, with the exception, we believe, of the Vicksburg and Bessemer cases, and the case of State v. Yazoo V. R. Co. 62 Miss. 607, are fully discussed in the exhaustive opinion of Judge Wellborn of the Circuit Court below, and are shown to be clearly distinguishable from the case at bar. We submit that the same is true of the remaining cases.

In the case of Pingree v. Michigan Central R. Co., 118 Mich. 314, the charter of the company provided: *"that it should be lawful for the said company, from time to time, to fix, regulate and receive the tolls and charges taken for the transportation of property and persons on said railroad, subject only* to a limitation as to passengers of three cents a mile, and ten cents in addition on distances not exceeding thirty miles."

The court said:

> "The charter of the respondent contains a direct grant of power to fix, regulate and receive tolls. It also fixes what it evidently considered a reasonable rate as to passengers, viz., three cents per mile. It clinches the matter by providing that the respondent's right to fix tolls should be limited by the rate of three cents, and by that *only*."

In the case of Omaha Water Co. v. City of Omaha, 147 Fed. Rep. 1, it appears that the legislature of Nebraska empowered the city of Omaha to make a

contract with individuals or corporations "to construct and maintain water works on such terms and under such regulations *as may be agreed on.*"

In the case of Detroit v. The Detroit City Street Railroad Company, 184 U. S. 368, the statement shows that in 1899 the common council of Detroit passed an ordinance reducing the rates of fare on the street railroads of the complainant.

In 1855 a tram railway act was passed by the legislature, and the street railway act in 1867. By amendment in 1861 the former act provided for the incorporation of street railways which had not previously existed. The said amendment provided that no company should be authorized to construct a railway under the act through the streets of any town or city without the consent of the municipal authorities, and under such regulations and upon such terms and conditions as said authorities may from time to time perscribe. In 1867 the section of the tram railway act as amended in 1861 was further amended by adding an additional proviso to the effect that after such consent had been given and accepted by the company or corporation to which a franchise should be granted the authorities of the city should make no regulations or conditions whereby the rights or franchises so granted should be destroyed or unreasonably impaired, or such company be deprived of the right of constructing, maintaining and operating such railway in the street named in the grant pursuant to the terms thereof. These sections of the tram railway act made no special provisions as to rates of fare, and there were no other sections of the act which did. The last amend-

ment of the tram railway act was passed twenty-two days after the passage of the street railway act of March 5, 1867. Section 20 of the latter act was as follows:

> "Sec. 20. The rates of toll or fare which any street railway company may charge for the transportation of persons or passengers over their road shall be established by agreement between such company and the corporate authorities of the city or village where the road is located, and shall not be increased without the consent of such authorities."

Section 29 of the street railway act provided:

> "That all companies and corporations heretofore organized for the purpose of building and operating street railways under the statutes then in force shall have the same powers, rights, protection and privileges and shall be subject to all the liabilities as are hereby provided for companies and corporations organized under the provisions of this act."

Some of the railroads of the complainant were organized under the tram railway act and some under the street railway act of 1867. The Detroit Street Rail way company, one of the companies owned by the complainant, was organized under the tram railway act, and its franchise provided that the rate of fare for any distance shall not exceed five cents in any one car or on any one route named in this ordinance. This company received its franchise in 1862, and in 1879 a supplemental ordinance was passed providing for extensions of tracks through other streets of the city, and extended the powers and privileges conferred and the obligations imposed by the original ordinance for thirty years.

As to the other companies organized under the tram

and street railway acts various ordinances were passed granting or extending their franchises and the language with reference to fares was to the effect that the rate of fare should not exceed five cents. It was contended that these statutes and ordinances contain the contracts or agreements as to the rate of fare, the obligation of which was impaired by the ordinances of 1899. The various ordinances contained reservations of the right to alter, etc., in various forms, as the right to make further regulations or reservations as might from time to time be deemed necessary to protect the interest, safety and welfare or the accommodation of the public in relation to said railways, but none of the reservations referred in terms to rates of fare. The crucial question in the case was whether the ordinances of 1899 reducing the rates of fare were valid and the answer to that turned upon the question whether the provisions in the various franchises as to rates of fare constituted a contract. The court said:

> "There can be no question in this court as to the competency of a state legislature unless prohibited by constitutional provisions, to authorize a municipal corporation to contract with a street railway company as to the rates of fare so as to bind during the specified period any future act of the council from altering or in any way interfering with such contract. (Citing cases.) The contract once having been made the power of the city over the subject so far as altering the rates of fare, or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract."

The court said that the rate of fare is among the most material and important of the terms and conditions

which might be imposed by the city in exchange for its consent to the laying of railroad tracks and the running of cars thereon through its streets, and held that the language of the tram railway act permitting consent upon such terms and conditions as the city might from time to time prescribe did not constitute a reservation of the power to alter or reduce the rates specified in the franchise ordinances. The court said:

> "It is plain that the legislature regarded the fixing of the rate of fare over these street railways as a subject for agreement between the parties and not as an exercise of a governmental function of a legislative character by the city authorities under a delegated power from the legislature. It was made matter of agreement by the express command of the legislature. Ordinances of a like nature were passed by the common council relating to the other companies and all of them were accepted in writing, and they all had in them provisions relating to or referred to ordinances providing for the rate of fare in language similar to the foregoing."
>
> "Coming to a consideration of the effect of the language used we think it amounted to a contract as to rates of fare. The ordinance of 1879 and the similar ordinances thereafter passed relating to the other corporation, together with the street railway act of 1867, and sections 20 and 29 thereof, make out plain agreements entered into between the parties in relation, among other things, to the rates of fare to be charged by those companies."

In the case of City Railway Company v. Citizens' Street Railroad Company, 166 U. S. 557, it appeared that a law of Indiana passed in 1861 authorizing the incorporation of street railway companies, provided that stockholders of such companies should be a body politic and corporate *in perpetuity*, and that a street railroad

company which may be organized under the act should first obtain the consent of the common council of incorporated cities to the location, survey and construction of any street railroad through or across the public streets of any city before the construction of the same should be commenced. In 1864 the common council of Indianapolis by ordinance granted permission and authority to the Citizens' Street Railway company to construct and operate a passenger railway in certain streets in the city. Nothing appears to have been said in the original ordinance relative to fares. In 1888 the Citizens' Street Railway company sold and conveyed its plant to the Citizens' Railroad company. This sale and transfer was approved by the city by ordinance which authorized the use of electric power by the company. In 1893 the city through its board of public works entered into a contract with the defendant, the City Railway company, giving it permission to lay its tracks for street railway lines in a larger number of streets, most of which were already occupied by the lines of the complainant company. In deciding that the subsequent grant to the City Railway company to operate its road over streets covered by the prior grants to the Citizens' Street Railroad company, this court, as we understand it, held that the previous franchise constituted a contract "which the state was not at liberty to impair during its continuance." The subject matter of the original agreement—construing the agreement to be that under its franchise the original company should have the use of certain streets during the life of its franchises—was that so long as the original company operated its road in

compliance with its franchise the obligation of that agee-ment could not thereafter be impaired. In applying the doctrine of the case last referred to to the Detroit case, this court said:

> "Although in that case there was no provision in the statute directing that the rate of fare should be established by agreement, yet, nevertheless, it was held that the language used *amounted to an agreement upon the subject matter* which could not be altered during its continuance by either party."

In the case of Cleveland v. the Cleveland City Railway Company, 194 U. S. 517, the facts were that in 1879, an ordinance was passed by the city council of Cleveland, granting to the Kinsman Street Railroad company, an Ohio corporation, a certain renewal franchise to reconstruct, maintain and operate a street railroad in certain streets in the city of Cleveland. A section of the ordinance provided that the company should not charge more than a five-cent fare, "the council, however, reserving to itself the right to hereafter increase or diminish the rate of fare as it may deem justifiable and expedient." In 1880 another Ohio corporation, the Woodland Avenue Railway company became the owner of the Kinsman Street Railroad, and in 1883 was granted the right to construct an extension of its line "and provision was made in the ordinance for a charge of one fare over the entire line." Another corporation known as the West Side Railroad company was operating a street railroad in the city of Cleveland under a franchise granted by the city council for a term of twenty-five years from February 10, 1883. These companies were independent of each other, and there was no ex-

change of traffic between them by transfers, and each was charging a five-cent fare. In 1885 these roads were consolidated, and the ordinance, the acceptance of which accomplished the consolidation, provided that for a single fare "no greater charge than five cents shall be collected, and that tickets at the rate of eleven for fifty cents, or twenty-two for one dollar shall at all times be kept for sale on the cars by conductors." In 1887 the consolidated company was authorized to extend its line, and the provision as to fare in the ordinance authorizing this extension provided that such right was granted "on the express condition that no increase of fare shall be charged by said railroad company on any part of its main line or on said extension, so that but one fare not to exceed five cents shall be charged between any points on said company's main line or extension, including the extension granted, and said company shall sell tickets on its cars as follows: eleven (11) tickets for fifty cents, and twenty-two (22) for one dollar." Later in the same year, August 12, 1887, the consolidated company was authorized to construct another extension by ordinance containing a provision as to rates of fare similar to that contained in the preceding ordinance. In 1893 another consolidation of street railroad lines took place in Cleveland and the consolidated corporation was known as the Cleveland City Railway company, the complainant in the action. It was admitted that as a result of the various ordinances and consolidations above referred to the corporation ceased to charge a cash fare of five cents for riding over the roads embraced in the Kinsman Street Railroad ordinance of 1879, and on the other roads

which had been at that time in existence; and on the contrary in consequence of the ordinances and authorized consolidations there was charged only five cents for a ride over the whole system or systems and tickets were sold and transfers issued as provided in the various ordinances.

In 1898 an ordinance was passed by the city council of the city of Cleveland reducing the rate of fare on the lines included in the franchise of the original Kinsman Street Railroad company under the clause of that franchise reserving to the council the right to thereafter increase or diminish the rate of fare. This ordinance fixed such fare over the lines and all extensions thereof at four cents.

The laws of Ohio under which all these transactions took place provided that no street railroad franchise should be granted except "to the corporation, individual or individuals that will agree to carry passengers upon such proposed railroad at the lowest rates of fare." The court, after referring to these statutes, embracing all which either directly or indirectly, during the period covered by the ordinances set out in the bill, vested the municipal council of Cleveland with power to regulate or to contract in respect to the rates of fare to be charged by street railways, said:

> "The statutes show that there was lodged by the legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated. The only limitation upon the power being that in case

of an extension or consolidation no increase in the rate of fare should be allowed."

The court said further:

"In reason the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ardinances for a stated time, and no reservation was made of a right to alter, that by those ordinances existing rights of the corporation were surrendered, benefits were conferred upon the public and obligations were imposed upon the corporations to continue those benefits during the stipulated time.

"When in addition we consider the specific references to limitations of time which the ordinances contain and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might thereafter be charged. Taking all the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 368, and approvingly referred to in Knoxville Water Company v. Knoxville, 189 U. S. 434, 437."

The next question considered by the court was whether the rate ordinance of 1898 impaired the obligations of those contracts. Upon this point the court held as follows:

"By the assailed ordinance the city of Cleveland assuming to assert continuing delegated power and upon the theory that the subsequent contracts were void as to that power disregarded the provisions for consolidations, extensions, etc., and whilst retaining all the benefits procurred by the ordinances

> for the public reduce the cash and ticket fares over the portions of the line embraced in the ordinance of 1879 of the Kinsman Street Railroad which had long since lost its identity and became merged with other roads. That this was an impairment of the contracts embodied in the prior ordinances we think is free from doubt."

The court, with reference to the contention by the city that the ordinances subsequent to the Kinsman Street franchise ordinance of 1879 were valid insofar as they attempted to deprive the city of a continuing legislative power to act on the reservation as to fares contained in that ordinance, rejected it on the ground that the courts in the state of Ohio "on reasoning commending itself" had held that a modification of a contract between a municipality and the owner of a street railroad made in good faith for the better accommodation was not void as an impairment of an obligation or liability imposed upon a railroad corporation within the meaning of section 2502 of the Revised Statutes of Ohio.

In the case of Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, the city made a contract with the company for furnishing the water supply of the city. The city of Vicksburg by act of the Mississippi legislature of 1886, was authorized "to provide for the erection and maintenance of a system of water works to supply said city with water and to that end *to contract* with a party or parties who shall build and operate water works."

The next case relied upon by appellant is that of Stone v. Yazoo, etc., Ry. Co., reported in the 62 Mississippi, page 607. In this case, by an act of the legislature

passed in 1882, entitled, "An act incorporating the Yazoo Mississippi Valley Railroad company and declaring its powers," the following provision appears:

"Section 6. Be it further enacted that said company shall have and possess the power of fixing from time to time by its board of directors the rates at which it would do express and telegraph business, and shall transport other express companies as may apply for transportation over its lines at a just and reasonable rate of compensation, and also the rates at which said company will transport persons or property over its railroads and branches, provided such last mentioned rates shall not exceed 4 cents per mile for each passenger nor exceed the following rates for freight," etc. (Here enumerating maximum rates for various classes of freight.) * * *

These cases all disclose some *positive* basis for a contract, in the sense in which counsel use the term as applied to limitation of rates in the franchises, and there is in none of them, so far as we have discovered, any positive reservation of the rate fixing power in or by the authority that granted the franchise. They do not, in our judgment, illustrate any principle that could sustain appellant's contention.

VII.

**There is no contract as to rates embodied in the franchise of appellant, except a contract that it may enjoy its franchise for the term if it complies with the conditions of the franchise. The limitation as to rates, under the laws here involved, is only one of the conditions to the enjoyment of the franchise.**

It is claimed by appellant's counsel (page 97 of their brief) "that when *all* the circumstances preceding, surrounding and entering this grant of franchise are considered, it will clearly appear that it constitutes a *contract*, fixing maximum rates of charges for the term of the franchise," etc. That the franchise places a fixed limit, beyond which charges cannot go, is, of course, obvious. But that this limit is so far *contractual—fixed by agreement*—between the city and the company, that the city cannot exercise its legislative power of regulation within the limitations by ordinance, as contained in its charter, we do not admit.

Counsel for appellant have devoted a large portion of their brief to an analysis of the Broughton Act. If that act alone were the only law we were dealing with, it might be safely contended that the city would not have power to regulate rates in such manner as to interfere with the maximum rates set out in the franchise. But that is not the case. The city charter enters into the problem,—a charter which existed many years *before* the Broughton Act was passed, and many years before this franchise was granted. What were the intentions of the legislature in passing that act and the construction to be placed upon it standing alone is *one*

thing; but what the objects were of the charter provisions as to regulation, adopted long before the days of the Broughton Act, is *another* thing, and quite as relevant, for the latter must certainly be taken into account. The two laws must be construed together in connection with the franchise.

The Broughton Act says nothing about rates whatever; the franchise merely prescribes maximum telephone rates, and the pre-existing charter provides that the city council shall have power to fix and determine telephone rates. If the fixing of rates is, and was before and at the time of the passage of the Broughton Act, a continuing legislative power vested in the city council, as we have elsewhere contended, it would seem that there is nothing in the Broughton Act, or in the franchise here under review, to impair the exercise of that power. Certain it is that the surrender of the charter power to regulate rates must be so plainly and positively expressed that there can be no doubt or ambiguity. This is not a case where it is sought to exercise a power *conferred subsequent* to the coming into being of what might otherwise be called vested rights. The inclination of the courts apparent in all cases where vested rights have accrued to look closely into the question of impairment of a contract obligation, does not find here the same opportunity for its application that it does in cases of the character just referred to.

In considering the Broughton Act as bearing upon the question at issue, counsel for appellant say that "it is vitally related to the power of the city to contract respecting telephone rates." That it is vitally related to

the granting and exercise of the franchise held by appellant, is, of course, true, but that it has any direct or controlling relation to or bearing upon the question whether the City of Los Angeles has the power, under its charter and notwithstanding said franchise, to regulate rates, we deny. After carefully considering the elaborate analysis of the Broughton Act, beginning at page 34 and ending at page 67 of appellant's brief, from which it is argued that said act contemplates a contract for fixed rates, we are constrained to suggest that even if all that counsel say and infer therein be conceded, there is a reasonable and very present doubt upon the subject. And that doubt is intensified when the Broughton Act is construed in connection with the provisions of the city charter with reference to the regulation of telephone rates. That such doubt does exist we shall endeavor to show from the language of the Broughton Act and the fact that it does exist, we submit (even if there were no other elements in the problem) will be absolutely fatal to the appellant's contention.

We will preface our discussion of this question by the general remark that, so far as we have been able to learn, the Broughton Act has not been construed by the Supreme Court of the state of California in such manner, or at all, so that it could be said that any construction has been placed upon the effect in law of a franchise granted thereunder, which fixed maximum rates as among the conditions to the exercise thereof. In fact appellant's exhaustive argument upon the subject of the construction to be placed upon the Broughton Act

relative to rate limitation does not disclose any such authorities, and consequently we believe we may safely assume that the question is a new one, first decided by the Circuit Court below in this case, and to be considered here without the assistance of prior adjudications by the California courts.

It will be observed in the first place that the Broughton Act contains nowhere any provision which purports to vest directly or by implication in the city any specific power or any general power to make any contracts whatever other than a contract that the grantee of a franchise thereunder may enjoy a franchise from the city by the observance of its "conditions." Let us consider the language of the Broughton Act. It provides that "every franchise or privilege to erect or lay telegraph or telephone wires," etc., or "to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees or common councils or other governing or legislative bodies of any city and county, city or town within this state * * * shall be granted under *conditions* in this act provided and not otherwise." The application for the franchise is not required to set forth anything relative to the terms or conditions under which the franchise is applied for. All that the applicant for the franchise is required to do, so far as the statute is concerned, is to "file with the governing or legislative body of the municipality an application," and thereupon the governing body shall *in its discretion* advertise the fact of the application together with a statement "that it is proposed to grant the same." In the next place the advertisement of the

franchise "must state the character of the franchise or privilege proposed to be granted and the term for which it is granted." The machinery for the sale of the franchise is set forth in detail, and one of the conditions of its exercise is that a successful bidder and his assigns must "during the life of said franchise pay to the municipality two per cent of the gross receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession, with the proviso that no percentage shall be paid during the first five years succeeding its date." Also "that the work to erect or lay telegraph or telephone wires, etc., shall be commenced in good faith within not more than four months from the granting of any such franchise and if not so commenced within said time said franchise so granted shall be forfeited, and that it shall be completed within not more than three years thereafter, and if not so completed said franchise shall be forfeited, "with the proviso that for good cause shown the governing or legislative body may, by resolution, extend the time for completion not exceeding three months."

These conditions mentioned in the Broughton Act. we submit, constitute nothing more or less than limitations to be imposed by the city upon the exercise of a franchise. They are contractual to the extent that if the grantee of a franchise complies therewith, he will not be disturbed in the exercise of the franchise, but to no greater extent.

Section 9 of the act is as follows:

"No clause or condition of any kind shall be in-

> serted in any franchise or grant offered or sold under the terms of this act which shall directly or indirectly restrict free and open competition in bidding therefor, and no clause or provision shall be inserted in any franchise offered for sale which shall in any wise favor one person, firm or corporation as against another in bidding for the purchase thereof."

The grantee of the franchise, in section 7 of the act, is required to execute a bond to perform "each and every term and condition of the franchise," and section 8 makes it the duty of the attorney general, upon the complaint of any municipality or any taxpayer, to sue for the forfeiture of any franchise granted under the terms of the act for the compliance of any *condition* thereof. These references to the Broughton Act will show that it nowhere contemplates anything more than the embodiment of *terms or conditions* in any franchise proposed to be granted thereunder.

And, taking in connection with the Broughton Act, the provisions of the franchise in question, we find that the right, privilege and franchise thereby granted is to be exercised subject to the proviso that the same "shall be at all times exercised and enjoyed in accordance with and subject to each and every of the terms and conditions of this ordinance and not otherwise."

Examining then the franchise itself we find that each and every thing thereinafter specified is something that the telephone company is required to do or is required to comply with. The whole tenor of the language of the franchise is that each and every of the terms therein expressed is a restriction, limitation, condition or re-

quirement imposed upon the grantee by the city as a requisite to the enjoyment of the franchise.

In passing, we will call the court's attention to those provisions of sections 1 and 5 of the franchise which relate to the conduit district. Section 1 requires the grantee to maintain the underground conduit and wires along and under public streets and alleys in that portion of the City of Los Angeles now known as the conduit district and described therein, and section 5 requires that the work of constructing and laying down said conduit in said conduit district shall be commenced in a certain time, prosecuted continuously thereafter in good faith, and completed in not more than three years thereafter under penalty of forfeiture of the franchise. As well might appellant contend that this requirement constituted a contract between the City of Los Angeles and the telephone company and that such conduit district would not thereafter be extended so as to require the company to place its wires in conduits outside of the conduit district described in the franchise. Would appellant so contend? The charter of the City of Los Angeles contains a provision (found in the same section 31 that is before the court) which grants the council power "to require the removal from the public grounds, streets or alleys of any or all such poles" (i. e., poles for telegraph, telephone or electric wires) and the removal and placing under ground of any or all telegraph, telephone or electric wires. . It is a fact, we believe, although not in the record here, that under ordinances passed by the city council of the City of Los Angeles since appellant's franchise was granted, the Home Tele-

phone Company has been required to and has laid many such conduits in the public streets of the City of Los Angeles outside of the district described in its franchise. We are not advised that the Home Telephone Company complained of this extension, or raised any point that their franchise exempted them from the operation of such ordinances, on the ground that a *fixed* district was named therein; and yet, if the contract theory of this franchise is to prevail to the extent that appellant contends, we see no substantial difference between a contention on its part that the conduit district could not be extended as to it, and the contention here that the limitation as to rates exempts it from the exercise of the regulative power conferred upon the city by the charter as against said company. True, relief could be had at law if the council attempted to enlarge the district to such an extent as to place a destructive burden of expense upon the company; but is not the same also true of rates? They must be reasonable, and if unreasonable the courts will afford proper relief.

Among the conditions of this franchise is that the rent or charge for telephone service shall not exceed certain maximum figures. We contend that this, taken in connection with the language of the Broughton Act and with the language and tenor of the franchise itself, constitutes nothing more or less than the imposition of a limitation upon the power of the telephone company in that behalf. And so far as anything can be inferred from the Broughton Act or the franchise, no rent or

charge for telephone service should ever exceed the limit specified in the franchise.

There is no provision in the Broughton Act authorizing the city and any person obtaining or desiring to obtain a franchise thereunder to *agree* upon the terms and conditions thereof, or to make any contracts whatever with relation thereto. We submit that the whole theory upon which the Broughton Act is founded is that the municipal authorities shall impose terms and conditions without being required by the law to take the wishes of any person into account and that any person is at liberty to accept them or not as he pleases. The fundamental idea is, we take it, that the city declares what shall be the conditions of the grant, and that the city as the first party to be considered imposes the terms upon which the grantee may have the privilege of using and occupying the public streets, and any person may accept them or reject them. These terms and conditions are not made in pursuance of any contractual relations engendered after negotiations with the municipal authorities. The practice has been followed, and was followed in this instance, of setting forth in the advertisement of sale of the franchise the terms and conditions under which it will be granted, precisely in the same language as expressed in the franchise, so that all persons interested may know what they will be required to do if they elect to bid for the franchise.

Upon a full view of the Broughton Act we can not see that it contemplates or implies anything more than herein indicated as to the contractual nature of a franchise granted thereunder. Appellant's counsel

urge that the exaction of 2% of the gross income arising from the use of the franchise is indicative of a *contract* as to rates out of which the 2% must be paid. We do not so view this matter. The fact that the company is required to pay this into the city treasury is one of the considerations that could properly be taken into account by the council in fixing rates. But we do not perceive any evidence that a contract as to what the rates shall be is implied in this.

## VIII.

**The power of a municipality in California to make a contract for a term of years, suspending or surrendering legislative powers, is confined to contracts authorized by its charter, and relating to the municipality in its business capacity.**

Counsel for appellant urge (page 80 of brief) in general terms "that the right of a municipality to make a contract for a term of years controlling the further exercise of legislative or governmental power over its subject matter during such term is judicially established." That proposition, however, is subject to a material qualification, and that is, whether the contract, is in fact, authorized by the charter. If not so authorized either directly, or by necessary implication, we submit that the contention is incorrect. The cases of McBean v. Fresno, 112 Cal. 161; Contra Costa Water Co. v. Breed, 139 Cal. 432; Dorland v. Clark, 143 Cal. 176; Santa Ana Water Co. v. Town of San Buena Ventura, 56 Fed. 339, and Los Angeles Water Co. v. City of Los Angeles, 88

Fed. 720, are cited in support of appellant's contention. The last two cases have been considered elsewhere and we will not repeat here what is there said in reference to them. In those cases, it appeared that the contracts were authorized as a necessary incident to powers directly conferred upon the city.

As to the cases in the California Reports cited, they proceed upon the existence of a charter power, or upon a power necessarily implied in such charter power, so far as they are relevant here.

In the case of McBean v. Fresno, (*supra*) the city of Fresno made a contract for the disposition of its sewage for the period of five years for a stipulated annual sum. The disposition of sewage is one of the purposes for which all municipal corporations are organized—city governments exist for just such purposes.

The court said:

> "We have here, then, *a contract made for a purpose expressly authorized by the charter*, a contract which looked to supply the city with an absolute need, a contract which pertained to the ordinary expenses of the city," etc.

In the case of Dorland v. Clark, (*supra*) the city of Sacramento made a contract to supply the city with a system of fire alarm telegraph. As to the nature of this contract, the comments upon the previous case apply with equal force. Fire protection is one of the necessaries of city life, and without the power to provide it, a municipal government would be a useless thing. No question was involved in this case as to the power of the city to provide by all proper means against fires.

The court said that "the board of trustees had the power to enter into all lawful contracts on behalf of the city."

In case of Contra Costa Water Company v. Breed (*supra*), the city had made a contract to supply *itself* with water. The nature of the contract, in that case, is thus characterized by the court:

> "When a municipal corporation engages in ordinary business transactions, such as purchasing supplies, it exercises merely the right of a private corporation or a natural person; and when making contracts about such matters, it is not regarded as exercising political or governmental powers, and, like natural persons, it is subject to the principle that after it has received the benefit of a contract, within the scope of its power to make, it is estopped from denying its validity in an action based on such contract."

Those cases are fundamentally different from the case at bar, and the principle therein declared has no application here. They all turn upon the *power* of the city to make the contract as to the subject matter; such power was shown to exist. Here it is not shown to exist.

## IX.

**The true test of the validity of ordinance, Exhibit D is the reasonableness or unreasonableness of its provisions.**

The true test to be applied to an ordinance prescribing the rates of a public service corporation is whether the rates allow a fair and reasonable return upon the investment, the fundamental consideration being the value of the plant. It is not alleged in the complaint

herein that the maximum rates prescribed for the Home Telephone Company by the ordinance do not allow such return, and the complaint is insufficient in that respect. It is incumbent upon the appellant to state in what particulars the rates prescribed by ordinance are unreasonable or unjust in order to sustain its allegation that the ordinance in question discriminates against it. Under the decisions of the Supreme Court of the state of California and of the United States, it is not merely sufficient to allege discrimination or unreasonableness in general terms. The courts are loath to set aside ordinances fixing rates and will do so only upon a showing of such a clear case of unreasonableness as will bring the ordinance under constitutional prohibitions. It will be observed that the ordinance, exhibit "C," contains provisions which clearly show that one of its principal objects is to put the city council in possession of such facts as will enable it to prescribe reasonable and fair rates.

In the complaint the appellant alleges that it has not complied with said ordinance, nor any part thereof, and that it declines to comply therewith. Appellant is, therefore, in the position of stating that it will not submit to any investigation of its property and business by the City of Los Angeles which would enable the city council to fix fair and reasonable rates in the light of the information obtained. The objection of the appellant, therefore, seems entirely against the power of the City of Los Angeles to fix rates at all, and the question of the reasonableness of these rates is not raised. Then in order to entitle the appellant to relief at the hands of this court

it appears to us that it must make some showing that the action taken by the city is so unreasonable as that it would violate the appellant's constitutional rights. In the case of

> Covington etc. Turnpike Co. v. Sandford, 164 U. S. 578,

the court had under consideration the question of rates, and it said:

> "When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders, but that involves an inquiry as to what is reasonable and just for the public. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. If a corporation cannot maintain such a highway and earn dividends for stockholders it is a misfortune for it and them which the constitution does not require to be remedied by imposing an unjust burden upon the public. So that the right of the public to use the defendant's turnpike upon the payment of such tolls as in view of the nature and authority of the services rendered by the company are reasonable is an element in the general inquiry whether the rates established by law are unjust and unreasonable. * * * The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature when exerting its general powers is that it receive what under all the circumstances is such compensation for the use of its property as will be just both to it and to the public. * * * Each case must depend upon its special facts, and when a court,

without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are as an entirety so unjust as to destroy the value of its property for all the purposes for which it was acquired its duty is to take into consideration the interests both of the public and of the owner of the property together with all other circumstances that are fairly to be considered in determining whether the legislature has under the guise of regulating rates exceeded its constitutional authority and practically deprived the owner of property without due process of law."

The Supreme Court of California considered the question of the legislative regulation of water rates in the case of

Redlands etc. Water Co. v. Redlands, 131 Cal. 365,

and said:

"The ordinance of the board of trustees which the plaintiff seeks to annul was regularly adopted and is in proper form and whatever grounds there may be for asserting its invalidity must be shown by extrinsic facts. It was, therefore, incumbent upon the plaintiff to present to the Superior Court and to have incorporated upon the record upon this appeal, the facts upon which it would claim such invalidity. The invalidity urged by it is that the rates fixed thereby will not yield a reasonable compensation for its service in addition to the amount necessary to be expended by it in performing the service. But as the value of the plant is the basis upon which the court was to determine the sufficiency of the compensation it was essential to present that fact to the court before the plaintiff was entitled to a judgment that the rates are unreasonable."

"If the council has fixed rates so palpably unreasonable and unjust as to amount to a taking of plain-

> tiff's property without just compensation it has so far exceeded the powers conferred upon it and the court is competent to afford redress."
>
> San Diego Water Co. v. San Diego, 118 Cal. 556;
>
> Atlantic & Pacific R. R. Co. v. U. S., 76 Fed. 186.

In order that the appellant may be in a position to ask relief at the hands of this court it will, therefore, be necessary for it to comply with ordinance, Exhibit C, which prescribes that the appellant shall make an annual report giving in detail an itemized inventory of all the works, lines, plant and property owned and used by it, and showing the actual cost and present cash value of each item thereof. If such facts are not before this court it is impossible to determine whether or not the rates prescribed by ordinance, exhibit "C," are reasonable or unreasonable. When no such showing is made we submit that the objections raised by the appellant to the ordinance prescribing the maximum rates cannot be sustained.

The appellant must apply to the court for equitable relief with clean hands. It is by its own affirmative statements a violator of the law. In Rural Home Telephone Co. v. Kentucky & I. Telephone Co. (Ky. 1908), 107 S. W. 787, the court said:

> "The franchise or privilege to establish and operate a telephone system in a city or town can only be acquired by observing the constitutional provisions and a company that seeks to defend its right to the use of the streets and highways of a city in any other way than under the constitution is a tres-

passer and without standing in court. In this condition the appellant company comes to the court and asks relief that can not, for the reasons stated, be granted."

X.

**Ordinances "C" and "D" are Not Objectionable in any Constitutional Sense.**

As to the question of whether or not any notice was required by law to be given to the appellant by the appellees of their intention to pass ordinances exhibit "C" and exhibit "D," it is only necessary to consider whether or not the action of the said city council in passing said ordinances was in its nature judicial or legislative action. It is sometimes required that notice shall be given before the passage of an ordinance. This is the case, however, only where the action of the city council, though in the form of an ordinance, is in its nature judicial rather than legislative, and private rights are involved. It has been held, and the statutes of the states generally require that notice shall be given in the case of ordinances to condemn land for the purpose of widening a street, to establish a street line encroaching on private lands, to provide for municipal improvements, to be paid for in whole or in part by assessments upon the property benefited, or to abate nuisances and the like. The requirement of notice in such cases is based upon the fundamental right of the property owner to be heard upon a measure which materially affects his interests. This rule does not apply, however, in the case of the regulation of a public use, for in such cases, the re-

quirement of notice canot be applied. As has heretofore been stated, ordinance exhibit "C" is the ordinance of the City of Los Angeles regulating the business and operation of public utility corporations. This ordinance requires the plaintiff, among others, doing business of a public nature, to make a report to the city council setting forth the value of its plant and the nature and extent of its business, in order that by means of such information, the city council may properly and justly fix the rates to be charged by the plaintiff. The passage of this ordinance is clearly a legislative act, in that it provides for the regulation of a public use.

One large field of legislative activity which is placed under the head of police power is the regulation of business or property *affected with a public interest*. The doctrine was authoritively declared in Munn v. Illinois, 94 U. S. 113, being then developed from the principle of the common law. This court has stated this doctrine in the following language:

> "Property does become clothed with a public interest when used in a manner to make it of public convenience and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest in that use he must submit to be controlled by the public for the common good to the extent of the interest he has thus created."

Munn v. Illinois, 94 U. S. 113, 126;

Budd v. New York, 143 U. S. 517;

Brass v. Stadler, 153 U. S. 391;

Cutting v. Kansas City Stock Yard Co., 183 U. S. 79, 84.

From the principles already stated it follows that the rate of the charges of all business affected with a public interest is subject to regulation by the legislature. When the question was first presented in 1876 to the Supreme Court of the United States in Munn v. Illinois, the right of the state legislature to regulate rates was declared to be complete. The question of reasonableness was pronounced to be a legislative one and it was stated that for "protection against abuse by legislatures the people must resort to the polls, not to the courts."

Peik v. Chicago etc. Railroad Co., 94 U. S. 164, 178.

The doctrine thus announced, however, has undergone progressive modification in later decisions. In the railroad commission cases, 116 U. S. 307, which came before the court in 1886, the court declared that there were limitations on the state's authority. "This power to regulate," it was said, "is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the state can not require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

Railroad Commission Cases, 116 U. S. 331;
Dow v. Beidelman, 125 U. S. 680, 688;
Georgia Railroad, etc., Co. v. Smith, 128 U. S. 179;

The prescribing of future rates is a legislative act

while the inquiry whether existing rates are reasonable is a judicial act.

Interstate Commerce Commission v. Cincinnati etc. Railroad Co., 167 U. S. 479, 499.

When the rates were established, not by the legislature directly but by administrative board created by the legislature, the court said:

> "The question of the reasonableness of a rate or charge for transportation by a railroad company, involving as it does, the element of reasonableness both as regards the company and as regards the public, is evidently a question for judicial investigation requiring due process of law for its determination."

Chicago etc. Railroad Co. v. Minnesota, 134 U. S. 418-458;

Louisville etc. Railroad Co. v. Kentucky, 183 U. S. 503-510.

This requires in such cases hearing and notice, but when the legislature acts directly in establishing rates no notice and hearing is necessary.

Budd v. New York, 143 U. S. 517.

Even when the legislature acts directly the courts have power to set aside unreasonable rates. "The legislature," this court has said, "has power to fix rates and the extent of judicial interference is protection against unreasonable rates."

Chicago R. Co. v. Welman, 143 U. S. 339;

Reagan v. Farmers L. & T. Co., 154 U. S. 362;

St. Louis R. Co. v. Gill, 156 U. S. 649, 657;

Covington etc. Turnpike Road Co. v. Sandford, 164 U. S. 578, 592;

Interstate C. C. v. Cincinnati etc. R. Co., 167 U. S. 479-499;

Lake Shore etc. R. Co., v. Smith, 173 U. S. 687.

In a case involving the validity of water rates fixed by local authorities the same principles were laid down under court edict:

> "Judicial interference should not occur unless the case presents clearly and beyond a doubt such a flagrant attack on the rights of property under the guise of regulation as to compel the court to say that the rates prescribed would necessarily have the effect to deny just compensation for private property taken for public use."

San Diego Land Co. v. National City, 174 U. S. 739-754;

Stanislaus County v. San Joaquin etc. Co., 192 U. S. 201.

In Smyth v. Ames, 169 U. S. 466, decided in 1898, the court after full examination of authorities sums up its conclusions on this point as follows:

> "While rates for the transportation of persons and property, within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, can not be so conclusively determined by the legislature of the state or by regulations adopted under its authority that the matter may not become the subject of judicial inquiry."



The question of the reasonableness of the rate is an equitable question depending on a consideration of all the circumstances of the particular cases and requiring the weight of the various interests involved. On the one hand the interests of the owners of the property, including those who have acquired rights therein as bond holders, and on the other the interests of the public. What the property owners are entitled to ask is a fair return upon the value of that which is employed for the public convenience. What the public is entitled to demand is that no more be exacted from it than the services rendered are reasonably worth.

Smyth v. Ames, 169 U. S. 466-547.

In a case involving the validity of rates prescribed for a turnpike company the court said:

> "Each case must depend upon its special facts, and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for the purpose for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority and practically deprived the owner of property without due process of law."

Covington Turnpike Road Co. v. Sandford, 164 U. S. 578-597;

McGehee on Due Process of Law 318-322.

See also:

Georgia Banking Co. v. Smith, 128 U. S. 174, 179;

C. B. & Q. Ry. Co. v. Illinois, 200 U. S. 561;

Williams v. State (Ark. 1908), 108 S. W. 838.

In the case of Budd v. New York (*supra*) it was contended, that under the decision of this court, in Chicago etc. Ry. Co. v. Minnesota, 134 U. S. 418, the fixing of elevator charges is a judicial question as to whether they are reasonable or not; that the statute must permit and provide for a judicial settlement of the charges and that by the statute under consideration an arbitrary rate is fixed and all inquiry is precluded as to whether that rate is reasonable or not. The court said:

> "But this is a misapprehension of the decision of this court in the case referred to. In that case the legislature of Minnesota had passed an act which established a railroad and warehouse commission and the Supreme Court of that state had interpreted the act as providing that the rates of charges for the transportation of property by railroads recommended and passed by the commission should be final and conclusive as to what were equal and reasonable charges and that there should be no judicial inquiry as to the reasonableness of such rates. A railroad company in answer to the application for a mandamus contended that such rates in regard to it were unreasonable and as it was not allowed by the state court to put in testimony in support of its answer on the question of the reasonableness of such rates, this court held that the statute was in conflict with the constitution of the United States as depriving the company of its property without due process of law, and depriving it of the equal protection of the laws. That was a very different

> case from the one under the statute of New York in question here, for in this instance the rate of charges is fixed directly by the legislature."

It is, therefore, clear that no notice of the intention of the city council to pass ordinance exhibit "C" was necessary, for the reason that the passage of said ordinance was a legislative act.

If the same objection to ordinance exhibit "D" could be made, namely, that said ordinance exhibit "D" was passed by said city council without notice to the parties interested, this objection is met by the same contention: That the passage of said ordinance exhibit "D" was a legislative act. If, however, it might be contended that the passage of ordinance exhibit "D" partook in some degree of the nature of a judicial act, it would be in order to call attention to the provisions of section 1 of ordinance exhibit "C," which are as follows:

> "Section 1. That the rates to be charged and collected by any person, firm or corporation, for gas, or electric light or for telephones, telephone service or telephone connections, furnished to the City of Los Angeles or the inhabitants thereof, shall be fixed at a regular or special meeting of the city council held during the month of February of each year, and shall take effect on the first day of July thereafter, and shall continue in full force and effect for the term of one year and no longer."

The provisions of said section 1 are sufficient to put plaintiff on inquiry, upon the well established theory that one is charged with notice of a fact, who has information putting him on inquiry, if, by following up such in-

formation with diligence and understanding the truth could have been ascertained.

Jennings v. Todd, 40 Am. St. Rep. 373.

But, as we have heretofore stated, the appellant herein is in no position to come into this court and complain of the provisions of ordinance exhibit "D," for the reason that appellant by its own admission, has refused and still refuses to comply with the provisions of said ordinance exhibit "C."

The appellant's contention that the city charter and the proceedings of the council thereunder with reference to the regulation of rates abridges the privileges and immunities of the appellant cannot be maintained for the reason that the appellant corporation is not a "citizen" within the meaning of the constitutional provision referred to.

Paul v. Virginia, 75 U. S. 168;
Norfolk & W. Ry. Co. v. Pa. 136, U. S. 114.

A further objection to ordinance, exhibit D, fixing the rates to be charged by the appellant is that said ordinance in express terms fixes the rates of that particular company only and is not a uniform schedule applicable to all companies engaged in the telephone business. Appellant does not allege in what manner this operates as a discrimination against it other than in general terms, as "that the adoption of said ordinances, exhibits D and E, fixing the different rates to be charged for the same service deprives the appellant of the equal protection of the law and discriminates against the plaintiff in favor

of the Sunset Telephone & Telegraph company, a similar corporation." (Tr. pp. 16 & 17, fols. 25 & 26.)

In the case of City of Detroit v. Fort Wayne & Bell Isle Railway Company, 20 L. R. A., 79, the court had under consideration a city ordinance of the city of Detroit, enacted January 1893, which required the defendant to "issue and sell, by its conductors, or their duly authorized agents, to persons applying therefor upon each and every car operated by said company within the limits of the city of Detroit, tickets to be good for transportation over the entire route of said company, or any portion thereof, traveling continuously either way between certain hours at the rate of eight tickets for twenty-five cents. The rate of fare to be charged by the defendant company was originally fixed in its franchise at five cents. The defendant corporation contended that this ordinance was unequal in its operation, that it discriminated unlawfully against the defendant corporation in that other street railway companies in the city of Detroit were not governed by the same restriction. The court said:

> "The general rule is that ordinances should be general in their nature and impartial in their operation. Ordinances, however, containing grants are of necessity separate and independent of each other. These ordinances are adapted to these varying conditions and circumstances, and ordinances prohibiting a traction railroad company by name from running locomotives by steam on a specific street, does not contravene the principle stated. (Citing Richmond F. & P. Ry. Co. v. Richmond, 96 U. S. 521.) It does not follow that a like reservation is contained in every other railway ordinance."

It is obvious that a rate which might be fair for one company would be very unjust if equally applied to another. There are conditions which require the adjustment of rates according to the circumstances of each company, and objection to an ordinance cannot be sustained merely because another ordinance relating to another company fixes different rates even though the maximum rates prescribed for the other company are greater. The question must be confined to the reasonableness and fairness of the rates fixed in the ordinance objected to.

See

Chicago v. Chicago Union Traction Co., 199 Ill. 259; 59 L. R. A. 666.

XI.

**The Mayor and Council as a "Tribunal" to Fix Rates.**

The appellant makes strenuous objection to the mayor and council of the City of Los Angeles as a tribunal to fix rates, and it is said (page 148 of appellant's brief) that they are neither impartial nor deliberative.

The objection to conferring upon municipal legislative bodies or other boards the rate-fixing power on the ground that they are interested parties, is not a new one. The question has, however, been passed upon by this court and settled.

In the case of Spring Valley Water Works v. Schottler, 110 U. S. 347, the point was directly made that the board of supervisors of San Francisco was not an impartial tribunal, because the members of the board were

ndividually interested in the determination to be made. Upon this point the court said:

> "It is said, however, that appointing municipal officers to fix prices between sellers and buyers is in effect apointing the buyers themselves since the buyers elect the officers and that this is a violation of the principle that no man shall be a judge in his own case. But the officers here selected are the governing board of the municipality and they are to act in their official capacity as such, the board only performing the duty which has been imposed upon them. Their general duty is within the limit of their powers to administer the local government and in so doing to provide that all shall so conduct themselves and so use their own property as not unnecessarily to injure others. They are elected by the people for that purpose and whatever is within the just scope of the purpose may properly be entrusted to them at the discretion of the legislature."

It is quite true that a provision providing for the "recall" of public officers, including councilmen, has been adopted by the people of Los Angeles as a part of the charter of the city. But that is the concern of the people and the validity of the "recall" was assumed by the Supreme Court in a case which arose out of the exercise of that provision against a member of the council. The case was decided upon an issue that did not directly involve the validity of the "recall" provisions of the charter, but they were treated as though valid.

Davenport v. City of Los Angeles, 146 Cal. 508.

Counsel for appellant (page 151 of their brief) refer to some remarks made by a member of the Los Angeles city council when the fixing of telephone rates was under discussion. The fact that a member of the council

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thus expressed himself only tends to show that the member had a keen sense of the fact that the eyes of the people were upon him—a thing not always recognized by public officials. It might still be true that the rates should not be raised, as a matter of right. It is but fair to state however, that on the particular occasion to which counsel refers, there was a very full and fair hearing; statements of property, receipts and expenditures were filed, as contemplated by ordinance exhibit "C," witnesses were examined and attorneys made arguments.

This matter, however, is beside the issue here. The "recall" may be objectionable to some from a practical or political standpoint, but its presence in the charter does not, and we do not perceive how it can affect appellant's position in law.

We do not understand appellant to contend that it did not have the opportunity of a hearing before the council, but stress is laid upon the point that the ordinances were passed without notice to them. Exhibits "C" and "D." In discussing the nature of the founctions exercised under the constitution of California by the rate-fixing body and by the courts, (the rate-fixing body being the city council under Sec. 1, Art. XIV), the Supreme Court of California said:

> "Whether the fixing of rates by the council be called a legislative, a judicial, or an administrative act, it is certainly not an adversary judicial proceeding such as, under the constitution, will conclude private rights. It is a proceeding on the part of the government to which neither the water company nor the rate payers are parties, conducted without

notice to them, and without any right on their part to effectually intervene."

And further, referring to section 1, article XIV of the constitution of California, which provides for the fixing of water rates by the municipal councils, the court in this same case said:

"The meaning of the section is, that the governing body of the municipality, upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonable and unjust as to amount to arbitrary action, they violate their duty and go beyond the powers conferred upon them. Such was the conclusion reached by this court in Spring Valley W[illegible]r Works v. San Francisco, 82 Cal. 286, 16 Am. St. Rep. 116, to which conclusion we adhere."

San Diego Water Co. v. San Diego, 118 Cal. 556, 565, 566.

These observations of the Supreme Court of California are pertinent here, and we think answer appellant's counsel wherein they cite numerous cases in which notice is required in certain classes of proceedings for the condemnation of property for street purposes, and for the levying of assessments for local improvements. (See pages *138-148* of appellant's brief.) Such proceedings are always said to be *in invitum*, and do conclude private rights.

Appellant does not charge that it did not have a hearing before the rates were fixed, nor that the rates fixed are confiscatory, nor that the council did not pro-

ceed with due and fair deliberation therein. All these things must be presumed to have been done. The council, in this case, is a rate-fixing body in the same sense we submit, as a council is a water-rate fixing body under the constitutional provision referred to.

Finally, we would call attention that in the bill of complaint

XII.

**There is No Federal Question Involved.**

To establish its right to a hearing in the federal court appellant has charged (Paragraph 18, Bill of Complaint, Tr. fol. 17) that the ordinances complained of and their enforcement by the municipal authorities will impair the obligation of the contract between it and the municipality—that is, the franchise granted by the City of Los Angeles—in violation of the fourteenth amendment of the Constitution of the United States, and of the constitution of the state of California.

In support of this contention the bill charges that the City of Los Angeles had no right, under the constitution or the laws of the state of California, to regulate the charges to be made by the telephone company, or to prescribe rates different from those fixed as maximum charges in the franchise. Further, that such ordinances discriminate between complainant and other companies or persons engaged in similar business in the City of Los Angeles, and that the ordinances are not general laws or rules adopted by the city. And finally, that *if*

the provisions of the charter of the City of Los Angeles *purport* to give it the right to fix the rates as provided in the ordinances, such provision is void as being contrary to the constitution of the state of California.

Upon this foundation, and the general charge that "plaintiff has no plain, speedy or adequate remedy in the ordinary course of law," appellant claims to have presented a federal question.

It thus appears that the question of the validity of the ordinances complained of depends upon whether the charter provision, (section 31), purporting to authorize the city to regulate telephone rates, is valid. It is not claimed that this provision of the charter contravenes any provision of the federal constitution, but the contention is that it is void under the constitution of California. According to this contention, if the charter provision is valid under the state constitution, then these ordinances are valid and no question for federal adjudication exists. We submit that federal jurisdiction cannot be founded upon the alleged invalidity of these ordinances under the impairment clause of the constitution of the United States, when the ground of such alleged invalidity is merely that they contravene the constitution of California. The question of their invalidity on this ground is one of local or state law, to be determined in the state tribunals and is not cognizable by a federal court. Moreover if these ordinances are invalid under the constitution of California, and, therefore, their enforcement would impair the obligations of the franchise granted to appellant, the presumption is that the state courts will so declare.

"The presumption is in all cases that the state courts will do what the constitution and laws of the United States require. Chicago & Alton Railroad v. Wiggins Ferry Co., 108 U. S. 18; Shreveport v. Cole, 129 U. S. 36; Neal v. Delaware, 103 U. S. 370, 389; New Orleans v. Benjamin, 153 U. S. 411, 424. * * *

"We regard this bill as an attempt to evade the discrimination between suits between citizens of of the same state and suits between citizens of different states, established by the constitution and laws of the United States, by bringing into the Circuit Court controversies between citizens of the same state, an evasion which it has been the constant effort of congress and of this court to prevent, Bernards Township v. Stebbins, 109 U. S. 341, 353; Shreveport v. Cole, 129 U. S. 36, 44; and are of opinion that it should have been dismissed for want of jurisdiction."

Defiance Water Co. v. Defiance, 191 U. S. 184, 193.

We therefore submit that the judgment of the Circuit Court should be affirmed.

Respectfully,

LESLIE R. HEWITT,

*City Attorney and Attorney for Appellees.*

W. B. MATHEWS,

*Of Counsel.*

JOHN W. SHENK,

*On the Brief.*

time suspends for such period the governmental power of fixing and regulating rates, and in construing a franchise all doubts, both as to existence of contract and authority to make it, must be resolved against such suspension of power.

Whether an inviolable contract for rates exists must be determined in each case on the particular facts involved; even slight differences may turn the balance.

A power given by the State to one of its municipalities to "fix and determine rates," does not authorize that municipality to abandon the power, and to irrevocably establish rates for the entire period of a franchise.

Rate regulation is a legislative, and not a judicial, function, and *quære* whether notice and hearing are necessary to constitute due process of law in fixing rates. Where notice and hearing are indispensable to due process of law, even though the charter does not require it, an ordinance will not be declared unconstitutional at the instance of parties who actually had notice and an opportunity to be heard, as depriving them of property without due process of law within the meaning of the Fourteenth Amendment.

In this case objections to a municipal ordinance requiring a telephone company to report expenditures and receipts are untenable.

A city council is not disqualified from acting in rate regulation because the city is a heavy ratepayer, or because the members might be politically affected by their action.

The rule that every presumption is in favor of the validity of legislation applies to a city ordinance and it will not be held to be unconstitutional within the meaning of the Fourteenth Amendment, as denying the equal protection of the laws, where the party attacking it as imposing unequal rates upon it does not clearly show an improper classification.

This court will not consider the legality or effect of a provision in a city charter for submission of ordinances adopted by the common council to the people on the petition of a specified number of voters, when the ordinance involved was not so submitted.

The ordinances of the city of Los Angeles, fixing telephone rates, *held* not to be unconstitutional either as impairing the obligation of the contract contained in the franchise, as depriving the corporation affected of its property without due process of law or as denying it the equal protection of the law.

155 Fed. Rep. 554, affirmed.

THE facts are stated in the opinion.

*Mr. Oscar A. Trippet*, with whom *Mr. A. Haines* was on the brief, for appellant:

In order to determine the power of the city of Los Angeles, in granting the franchise in question, to enter upon a contract with the grantee thereof as to rates for telephone service, it is necessary to examine first the nature and scope of the power delegated to make the grant; the express requirements to be complied with in making it, and the extent of the discretion left to the granting body.

As bearing upon the question of such power to contract, the Broughton Act of March 11, 1901, and the charter of the city of Los Angeles are to be regarded as concurrent laws. *Los Angeles* v. *Davidson*, 150 California, 59, 63. The principle that the right to compensation is an inseparable incident to every franchise affected with a public use, must be kept in view.

The right to reasonable compensation is an essential and inseparable incident to the exercise of every franchise and privilege affected with a public use. *Stockton Gas Co.* v. *San Joaquin County*, 148 California, 313, 321; *Truckee Turnpike Road* v. *Campbell*, 44 California, 89; *State* v. *Boston &c. R. R.*, 25 Vermont, 433; *State* v. *Laclede Gas Co.*, 102 Missouri, 472; *S. C.*, 15 S. W. Rep. 383; *Water Co.* v. *Los Angeles*, 88 Fed. Rep. 720, 731.

So vital is this right and so absolutely incident is it, that even when it is left to continuous public regulation, unrestrained by contract, it comes under the guaranty of the Fourteenth Amendment. *Smyth* v. *Ames*, 169 U. S. 466, 522–526.

The Broughton Act is vitally related to the power of the city to contract respecting telephone rates, primarily because it requires the franchise to be publicly sold by the city council and in its discretion. The procedure to sell, prescribed by the statute, is contractual at every stage.

The requirement in § 3 of the act, that the successful bidder and his assigns must, during the life of the franchise, pay the municipality two per cent of the gross receipts, shows that the act contemplates that terms of sale of the franchise may embrace an agreement as to rates.

Every consideration shows that the Broughton Act c
ferred power upon the municipalities of the State to contr
as to rates for telephone service.

The legislature has power to confer this authority. *Detroit*
*Detroit &c. Ry. Co.*, 184 U. S. 368; *Vicksburg* v. *Vicksb*
*Water Works Co.*, 206 U. S. 495, 508. The Broughton A
more specifically contemplates authority to municipalities
contract than does any statute considered in the followi
cases, where the power of the municipalities to contract
to rates was upheld. *Vicksburg* v. *Vicksburg Water Works C*
206 U. S. 497; *Los Angeles* v. *Los Angeles City Water Co.*, 1
U. S. 558, 570; *Walla Walla* v. *Walla Walla Water Co.*, 1
U. S. 1, 3, 14; *Cleveland* v. *Cleveland R. Co.*, 194 U. S. 5
*Cleveland* v. *Cleveland E. R. Co.*, 201 U. S. 529, 540–5
*Omaha Water Company* v. *City of Omaha*, 147 Fed. Rep. 1,
12, 13; *Santa Ana Water Co.* v. *Town of San Buena Ventu*
56 Fed. Rep. 339; *State* v. *Laclede Gas Light Co.*, 102 Missou
485; *S. C.*, 14 S. W. Rep. 974; *City of Bessemer* v. *Besse*
*Water Works*, 40 So. Rep. 662.

The city charter concurs with the Broughton Act in c
ferring power upon the city of Los Angeles to contract as
rates in the sale of a franchise. It expressly confers the pow
to fix and determine rates for a definite period. It places
limitation upon the period for which the council is so e
powered to fix and determine telephone rates. The fixing a
determining of rates for a definite period is neither an aba
donment nor a suspension of the power to regulate by the ex
cise of it. *Bessemer* v. *Water Works*, 44 So. Rep. 663; *Vic*
*burg* v. *Water Works Co.*, 206 U. S. 510; *Cal. Reduction Wo*
v. *Sanitary Reduction Works*, 199 U. S. 306.

In California the right of a municipality to make a contr
for a term of years, controlling the further exercise of legis
tive or governmental power over its subject-matter during su
term, is judicially established. *McBean* v. *City of Fresno*, 1
California, 161; *San Francisco Gas Light Company* v. *Du*
62 California, 585; *Contra Costa Water Co.* v. *Breed*, 1[illegible] Ca

fornia, 432; *Dolan* v. *Clark*, 143 California, 176; *Los Angeles Water Co.* v. *City of Los Angeles*, 88 Fed. Rep. 720; *Santa Ana Water Co.* v. *Town of San Buena Ventura*, 56 Fed. Rep. 339.

The contemporaneous construction of the Broughton Act and of the powers of the city under its charter are controlling, and is in favor of our contention.

The ordinance "B," constituting the grant of complainant's franchise, embraces a contract as to maximum rates, mutually binding upon complainant and defendant.

When all the circumstances preceding, surrounding and entering into this grant of franchise by the ordinance are considered, it will clearly appear that it constitutes a contract, fixing maximum rates of charges for the term of the franchise. *Vicksburg* v. *Water Works Co.*, 206 U. S. 495; *Cleveland* v. *City Ry. Co.*, 194 U. S. 517; *Detroit* v. *City St. Ry. Co.*, 184 U. S. 368, 375, 389; *Water Co.* v. *Omaha*, 147 Fed. Rep. 1; *Detroit* v. *City Ry. Co.*, 60 Fed. Rep. 161, 171; *Bessemer* v. *Water Works* (Ala.), 44 So. Rep. 663; *State* v. *Laclede Gaslight Co.*, 102 Missouri, 472; *Pingree* v. *Michigan Central R. R. Co.*, 118 Michigan, 314; *State* v. *Yazoo & V. R. Co.*, 62 Mississippi, 607, 641.

*Mr. Leslie R. Hewitt*, with whom *Mr. John W. Shenk* and *Mr. W. B. Mathews* were on the brief, for appellees:

The State has power to regulate charges for telephone service, and this power may be delegated to municipalities. *Munn* v. *Illinois*, 94 U. S. 113; *Des Moines Gas Co.* v. *Des Moines*, 44 Iowa, 105; *People* v. *Suburban R. R. Co.*, 178 Illinois, 594; *St. Louis* v. *Bell Telephone Co.*, 96 Missouri, 623; McQuillan on Municipal Ordinances, § 583; *Danville* v. *Danville Water Co.*, 180 Illinois, 233.

The city of Los Angeles did not by the franchise ordinance surrender or suspend its power to regulate appellant's charges for telephone service. *Omaha Water Co.* v. *Omaha*, 147 Fed. Rep. 1, 5; *Munn* v. *Illinois*, 94 U. S. 124; *Budd* v. *New York*, 143 U. S. 517; *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624, 629; *Los Angeles Water Co.* v. *Los Angeles*, 88 Fed. Rep. 721;